

MODERN REPORTS;
OR,
SELECT CASES
ADJUDGED IN
THE COURTS
OF
KING'S BENCH,
CHANCERY, COMMON PLEAS,
AND
EXCHEQUER.

VOLUME THE NINTH.

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OF THE COURTS

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CONTAINING,

CASES argued and decreed in the HIGH COURT OF CHANCERY, in the Eighth, Ninth, Tenth and Eleventh Years of GEORGE THE FIRST. To which are added some SPECIAL CASES ON APPEALS; and an ADDITIONAL SERIES OF CASES in the COURT OF CHANCERY during the Time of LORD HARDWICKE, from Michaelmas Term in the Tenth Year of GEORGE THE SECOND to Trinity Term the Twenty Eighth of GEORGE THE SECOND.

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Esq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

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1795.

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EASTER TERM,

The Eighth of George the First,

The Year

1722,

I N

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

* Hungerford against Clay.

* [1]

Cause i.

EDWARD HUNGERFORD, the plaintiff, having mortgaged a house in *St. Clement's Lane* in *London* to the defendant *Clay*, tendered the principal sum and the interest to the said mortgagee; which he refusing to take, he, the plaintiff, exhibited his bill in this court, to have a re-conveyance upon the payment of the said money.

A mortgagee cannot make a lease of a house in mortgage before foreclosure, nor present on an avoidance.

S. C. 2. Eq. Abr. 610.
2. Vern. 392.
3. Ark. 518.
1. Will. 34.
1. Powell on Mort. 221.
2. Com. Dig. "Chancery".
(4. A. 6.).

The substance of the defendant's answer was, that he had made a lease of this house for five years, reserving so much yearly rent; and that after the expiration of the said term, he had covenanted that the lessee should hold it for four years longer, if he, the lessee, was willing so to do; that the said five years were now expired; that the lessee was willing to hold the house four years longer; and that if the plaintiff would grant such lease, then the defendant would re-convey, upon the payment of the said principal sum and interest.

This cause was heard at THE ROLLS, where the defendant had a decree in his favour;

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B

But

Easter Term, 8. Geo. 1. In Chancery.

HUNGERFORD
against
CLAY.

But upon an appeal to this court,

* [2]

IT WAS INSISTED *for the plaintiff*, that as a mortgagee cannot present upon the avoidance of a church, so, by the course of equity, he cannot make a lease of a house or lands in mortgage, but where there is an absolute necessity so to do, which does not appear in this case; for if the mortgagee should make such leases, they may be avoided by the mortgagor before the equity of redemption is foreclosed. * Now, admitting the mortgagee should make a lease for four years longer, reserving rent, and such lease should be adjudged good between him and the lessee, it would be difficult for the mortgagor to recover any rent, though the principal and interest should be paid, because he does not claim under the estate of the mortgagee, and therefore cannot have any benefit of the lease made by him; for he is neither party to the deed, nor privy to the estate, therefore the mortgagee ought to reconvey free from all incumbrances.

THOSE WHO ARGUED *for the defendant*, admitted that a mortgagee cannot present upon an avoidance of a church (a); the reason is, because it does not lessen his debt; but it is otherwise where he makes a lease of a house or lands in mortgage, rendering rent, for certainly the payment of rent will lessen the debt; so there is no parity of reason between those cases.

BUT THE LORD CHANCELLOR was of opinion, that the mortgagee, before foreclosure of the equity of redemption, cannot make a lease for years of a house in mortgage to bind the mortgagor, unless to avoid an apparent loss, and merely in necessity (b).

So the decree at THE ROLLS was reversed.

(a) See *Amhurst v. Dawling*, 2. Vern. 401. *Attorney General v. Scarisbrook*, 2. Vern. 350. *Gally v. Selby*, Strange, 403. S. C. Comy. 343. *Attorney General v. Hesketh*, 549. S. C. Prec. C. 214. S. C. 2. Eq. Abr. 377. *Jorry v. Cox*, Prec. Ch. 71. *Kinsey v. Langham*, Cases T. T. *Gardner v.*

Griffiths, 2. Peer. Wms. 403. *MacKenzie v. Robinson*, 3. Atk. 559. *Bot-teler v. Allington*, 3. Atk. 458. *Robinson v. Jago*, Bunb. 130. *Dimocke v. Hobart*, 1. Brown's P. C. 81.

(b) See *Lucam v. Mertins*, 1. Will. 34.

Case 2.

Orby against Trigg.

Equity will not interpose on a covenant that a mortgagee shall have the benefit of pre-emption, if it be not insisted on until after the estate is sold.

THE BROTHER of the now plaintiff mortgaged his lands to the defendant, and afterwards died. In the deed of mortgage there was a covenant to reconvey upon six months notice of the payment of the principal sum and interest; and another covenant, that, in case the estate was to be sold, the mortgagee should have the pre-emption. After the death of the brother, who was the mortgagor, his widow delivered up the counterpart of the mortgage to the attorney of the mortgagee.

3. C. 2. Eq. Abr. 599. 1. Powell on Mort. 140. Fontbl. Eq. 323. 384.

The

Easter Term, 8. Geo: 1. In Chancery.

The plaintiff having given the defendant six months notice, that he would pay the principal and interest, and having it ready to pay, the defendant refused to accept it.

ORRY
against
TRIGG.

The plaintiff thereupon exhibited his bill for a reconveyance of the estate, having entered into articles with a purchaser for the sale thereof.

The defendant, by his answer, insisted on the covenant in the deed to have the *pre-emption*.

But it appearing, that neither the plaintiff nor the purchaser knew anything of this * covenant, for that the counterpart of the mortgage was delivered up as aforesaid; and that the plaintiff had often made application to the mortgagee for a copy thereof, which was as often denied, he insisting only to have the principal and interest paid, for that the security was too narrow for the money which he had lent; and that if it was not paid by such a time, he would foreclose the equity of redemption, but never mentioned that he was to have the benefit of *pre-emption* until after the estate was sold; therefore he ought not now to claim it, to the prejudice of the purchaser and of the plaintiff, having so long time for that purpose before the estate was sold.

* [3]

And IT WAS DECREED accordingly, and the mortgagee to reconvey upon payment of the principal and interest, &c.

Ayliffe against Tracy.

Case 3.

UPON A BILL exhibited against the executors of *Sir Thomas Haselwood*, the case appears to be thus:

An agreement was made in the year 1720 between the plaintiff and *Sir Thomas*, that he the said plaintiff should marry the daughter of *Sir Thomas*, by which agreement the plaintiff was to settle so much lands in jointure, in consideration of the said marriage, and of three thousand pounds to be paid to him as the marriage-portion (a). The marriage took effect, and four years before

decreed that the husband shall not have the other 1000l. because he knew that 2000l. was devised to her, and having accepted that legacy in marriage, shall have no more.—S. C. 2. Peer. Wms. 65. S. C. 2. Eq. Ab. 19. 50. 1. Vern. 68. 2. Vern. 202. 1. Eq. Abr. 21. Stra. 738. 1. Vezey, 530. Amb. 424. 2. Com. Dig. "Chancery" (3. Z. 2.). 1. Fontbl. Eq. 179.

(a) *Mr. Peere Williams* states the case thus:—*Ayliffe* courted one of the daughters of *Sir Thomas Haselwood*, and treated with the father about the marriage; the father consented to the marriage, and wrote to his daughter, intimating that he had met *Mr. Ayliffe*, and had agreed to give him 3000l. as a portion, which, *Sir Thomas* said, he (*Ayliffe*) seemed fully to assent to, and that they were to meet the next day, when the affair was to be fully concluded; and subscribed his name

to the letter: That they met accordingly and agreed to the marriage; and the father gave money to the daughter to buy her wedding-clothes; that the wedding-day was appointed; but that before the day arrived *Sir Thomas* died; having made his will long antecedent to this treaty of marriage, and given his daughter only 2000l. That the daughter did not shew the letter to *Ayliffe*, whom she afterwards married. S. C. 2. Peer. Wms. 65. See *Douglas v. Vincent*, 2. Vern. 202.

Easter Term, 8. Geo. 1. In Chancery.

AYLIFFE
against
TRACY.

this agreement was made, viz. in the year 1716, *Sir Thomas Haselwood* made his will, and thereby devised to his said daughter the sum of two thousand pounds and no more; and before the said marriage was had, *Sir Thomas* died suddenly.

And now the plaintiff exhibited this bill against his executors, to have the other thousand pounds paid to him, according to the said marriage-agreement.

THE COURT was of opinion, that the plaintiff might have had some colourable pretence to this thousand pounds, if, before his marriage with the daughter, he had not known that her father had devised two thousand pounds to her, and no more; but having married the daughter, and accepted that legacy, he shall recover no more. * Besides, if this thousand pounds had been recoverable, it must be in right of the husband alone, for his wife has no manner of right; therefore if he die before it is recovered, his executors or administrators, and not the wife, will be entitled to it; so that he ought rather to have exhibited his bill for the whole three thousand pounds than for one thousand pounds residue thereof, because the two thousand pounds he received by virtue of the will, can be no part of the three thousand pounds upon the marriage-agreement.

So the bill was dismissed with costs (a).

(a) Nothing appears in the Register Book but the order of dismissal, Reg. Lib. A. 1721. fol. 285.

TRINITY

TRINITY TERM,

The Eighth of George the First,

IN

The Year

1722,

IN

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

Sir Robert Raymond, Knt. Attorney General.

Sir Philip Yorke, Knt. Solicitor General.

Gore against Gore.

Case 4.

THIS CASE upon the pleadings was agreed on both sides to be as follows :

The father being seised in fee, devised his lands to trustees, and their heirs, executors, &c. for the term of five hundred years upon such trusts as by his will should be declared; and from and after the expiration, or other sooner determination of the said term and estate, then to the use of the eldest son of his the said testator's eldest son, and the heirs males of his body; and for default of such issue to the use of his, the said testator's, second son, and the heirs males of his body; with several remainders over in tail. The father died, and his eldest son having no issue, the second son claimed the estate as the issue in tail male,

Devise to the eldest son of his eldest son in tail male, and for want of such issue to the use of his second son in tail male; he shall take immediately.

S. C. 10. Mod. 501.

S. C. 2. Peer.

Wms. 28.

S. C. 2. Eq. Ab.

339.

S. C. 2. Bar.

209. 229. 355.

S. C. 2. Stra. 958.

Fearne Ex. Dev.

2. Kel. 254. pl. 203. See 3. Vin. Abr. 370. pl. 14. Cro. Eliz. 878. Lutw. 793. 432. 2. Vezey, 243. Dougl. 470. 3. Term Rep. 143.

GORE
against
GORE.

should have this estate, either the second son of the * testator, or whether the fee-simple should remain in the trustees until his eldest son should have a son?

And upon hearing Counsel on both sides,

IT WAS THE OPINION OF THE JUDGES, that the second son of the testator should take immediately upon his, the testator's, death; and their reasons were,

FIRST, Because the son of the eldest son, not yet born, could not take by way of remainder, because there was no particular estate to support it; neither could he take by way of executory devise; so that if the fee-simple should descend on the heir at law of the testator, and vest in him until this contingency of the birth of his eldest son should happen, it would tend to a perpetuity.

Where a reference is to the Judges on a case stated, no writ of error will lie on their judgment.

Now this case coming back to the Court upon the Judges certificate of their opinions, it was moved that it might be argued again; because being referred to them by way of case stated, no writ of error would lie upon their judgment.

If they certify their reasons, the Court may consider of it.

THE COURT declared, that where a case is referred to the Judges for their opinion, it shall conclude this Court. It is true, it is not so when they come into court, and give their opinions here; but the Judges having certified their reasons for their opinions, this Court may consider thereof, like a general verdict at common law, which concludes the judgment of the Court; but if the jury specify their reasons for such verdict, it is otherwise. So where the king grants a thing *ex mero motu*, without any express consideration, such grant is good; but where the consideration is expressed in the grant, and it is either wrong or false, it makes the whole grant void, if the consideration is not executed, for this holds only where the consideration is executory.

Heb. 222.

Now if the parties should rest under this opinion of the Judges, there would be an end of the cause. And as this is a point which ought not to be determined by the opinion of any one Court, but to have a final determination in a proper method; therefore it was ordered, that Counsel should speak to this point at the hearing this cause, so that it may come before THE HOUSE OF LORDS upon an appeal, if either of the parties should think fit; but they agreed.

See the case of Boothby v. Vernon, post. 148.

Afterwards the testator's second son died without issue, whereupon D. a next remainder-man, bringing this matter yet once more into Chancery in Lord Chancellor TALBOT's time, his lordship referred this matter again to the Judges of the court of king's bench, who certified that they thought the remainder good, and that an interim estate, until the birth of the son of the testator's eldest son, and who was since born, descended to the testator's eldest son, and so the contingent remainder supported, as *Mr. Viner* heard (a).

(a) See 8. Vin. Abr. 370. pl. 14. *notis*.—See also 2. Peer. Wms. 64. where the two certificates in this case are stated.

* The Mayor and Burgesses of Coventry against Lord Craven and Others. Case 5.

AN INFORMATION had been formerly exhibited against the mayor, &c. for misapplying a charity; and upon a bill likewise brought against him in this court, it was made appear, that the magistrates of Coventry had taken four thousand pounds of this charity to their own use; and thereupon it was decreed, that they should repay that money by such a time, or that the lands thus given for this charity should be conveyed to other persons for the purposes aforesaid. But the magistrates not complying with this decree in paying the money, and not being able to advance the said sum of four thousand pounds, the said decretal order was signed, enrolled, and exemplified under the great seal; and by virtue thereof the said lands were conveyed to Lord Craven, and to twenty-nine other persons, and to their heirs, in trust, and for the benefit of the poor of that place.

Qu. Whether an original bill can be brought to alter a decree signed and enrolled.
Caf. Ch. 3.

And now the plaintiffs exhibited an *original bill* against the said trustees to have a reconveyance of these lands, upon payment of the said four thousand pounds, for that the donor having appointed the mayor for the time being, &c. to be trustees and overseers of these poor people, the lands ought not to be taken from them, but upon some great misdemeanor of their own; and that the reason for which they had been taken away was now of no force, for that the money was ready to be paid in full satisfaction for the faults of their predecessors; and that such reconveyance ought to be made the rather, because most of the members of the corporation in whose time this money was misapplied, were now dead, so that there could be no room for contesting their right to those lands; and for that, the mayor, &c. being a body politic, the now members of that body ought not to be damnified by the faults of their predecessors.

It is true, the former decree made against the now plaintiffs the mayor, &c. is signed and enrolled, and exemplified under the great seal; but yet the plaintiffs may have relief upon an *original bill* against such a decree (a); as for instance, The wife, after separation from her husband, had a decree in this court for alimony (b), which decree was affirmed upon a *bill of review*, and likewise upon an appeal in the house of peers; but the husband being willing to be reconciled to his wife, exhibited an *original bill* to set aside the said decree; and though it was confirmed with so much solemnity, yet the Lord Keeper FINCH, being assisted by the Judges, did agree, that it was a proper bill, and the husband was relieved (c).

* [7]

Therefore IT WAS INSISTED for the plaintiffs, that they being willing to perform every thing in the former decree, the lands ought not to be taken from them, but that they

(a) See *Wortley v. Birkhead*, 3. Atk. 809. S. C. 2. Vezey, 571. Taylor v. Sharp, 3. Peer. Wms. 371. Gould v. Tancred, 2. Peer. Wms. 534. Norris v. Le Neve, 3. Atk. 26. *Musfell v. Morgan*, 3. Brown's C. C. 74.

(b) The case of *Whorewood v. Whorewood*, 1. Ch. Rep. 250. Ch. Cases, 153.—See also 2. Com. Dig. "Chancery" (Y. 7.).

(c) Cases in Ch. 251. Eq. Abr. 67. 2. Com. Dig. "Chancery" (2. D. 2.).

Trinity Term, 8. Geo. 1. In Chancery.

THE MAYOR
AND
BURGESSES
OF
COVENTRY
against
LORD CRAVEN
AND OTHERS.

ought to have a reconveyance: besides, an original bill is proper where a decree hath been already obtained, for it may appear that such decree was obtained upon some precedent fraud or surprize; and after a decree to foreclose the equity of redemption, a longer time hath been allowed to pay the principal and interest. It is true, in this case, the conveyance is absolute to the defendants and their heirs; but it is still a conveyance under the decree of this Court, which is conditional, and like a conditional surrender and an absolute admittance, which must be made conditional, according to the surrender out of which it arises.

See Norris v.
Le Neve, 3.
Atk. 25.

Patterson v.
Slaughter, Amb.
293.

IT WAS INSISTED for the defendants, that this is a very improper bill, and not within the rules of this court, as it appears by a printed copy of those rules now produced; for amongst the rest it appears, that no decree shall be varied or altered, after it is exemplified under the great seal, unless for error in law or fact appearing in the very body of such decree, or by matter arising since the decree, or upon some evidence which could not be had at the time the decree was made. It is true, the plaintiffs offer now to pay the four thousand pounds, which they have raised out of other lands given to them in trust likewise for a charity, and for which there is an information already filed against them; so that if a reconveyance of the lands now in question should be decreed for them, and the plaintiff in the information should prevail, they might raise money out of the lands thus reconveyed, to satisfy the other charge against them.

THE COURT made no decree, but would consider the case of *Whorewood v. Whorewood*, which is truly cited as above.

* [8]

Case 6.

Annesly against Palmer.

THE CASE was thus: The testator made one will in the year 1708, and about four years afterwards, viz. in the year 1712, he made another will; and * by the first he devised all his real estate to charitable uses, and all his personal estate to particular legatees therein mentioned; and by his other and last will he devised his personal estate to other persons, and all his real estate to such uses as he should afterwards declare concerning the same, but died before he made any declaration of such uses.

Afterwards, upon a contest between the executors of both the wills, the first was proved in the spiritual court; and that probate was confirmed upon an appeal to the delegates; and upon this contest one of the executors having alledged, that the testator, *Sir William Robinson*, died without heirs, it was proved, that *Sarah Palmer*, the wife of the now plaintiff, was his heir at law. Whereupon she and her husband entered on the greatest part of the real estate, supposing that the first will, by which that estate was devised to a charity, was revoked by making another will; the claimants under the second will, until reversed by commission of review.

and

Trinity Term, 8. Geo. 1. In Chancery.

and the testator dying without making any other disposition thereof, it must descend to the plaintiff as his heir at law.

ANNESLY
against
PACMER.

And now upon a bill exhibited against her and her husband, by those who claimed under the first will;

IT WAS INSISTED *for her*, that the suit in the spiritual court was between the contending executors, and that she, though she was heir at law, was neither party or privy to that suit; and therefore she prayed that a decree might be made in her behalf as to the real estate, and likewise that the first will might be set aside as to the personal estate; for though the probate of that will was confirmed by the delegates, yet it is now evident that it was no will, being revoked by a subsequent will.

IT WAS ADMITTED *on the other side*, that the making a second will is a revocation of the first; but that is not the present case; for upon an issue directed out of this court to try whether the testator revoked his will, which he made in the year 1708, the jury found that he did not revoke it, "any otherwise than by making *another will* in the year 1712 (a)," which last clause was omitted by the clerk of the assize in drawing up the verdict; and on THE POSTEA it was returned generally, "that he did not revoke it;" which being neither the act of the jury nor of the Court, application was made to the court of king's bench, to certify that the verdict was drawn up as the jury found it, which was, "that the testator did not revoke his first will any otherwise than *by making another will*;" and after two motions made in full court for that purpose, the Chief Justice was inclinable to certify * that it was so; but he was over-ruled by the other three Judges, who, though they were satisfied in their consciences that it was so, yet would not introduce so dangerous a precedent (b).

* [9]

Therefore it was insisted, upon affidavits produced and read of this matter, to falsify that part of the record, either by a new trial, or by any other means the Court should direct.

But admitting the second will should amount to a revocation of the first, it shall be taken in a court of equity to be only a revocation *pro tanto*, and that is of the personal estate.

THE COURT. As to the personal estate, here is a will proved, and that probate confirmed upon an appeal to the delegates, which shall conclude all persons, both in law and equity, to make any demands thereof contrary to the said will. But now here is a subsequent will found by verdict, and that to the satisfaction of this

See Allen v.
Dundas, 3.
Term Rep. 125.

(a) See the case of Hitchins v. Basset, 1. Show. 537. Comb. 90. 209. 3. Mod. 203. Salk. 592. Show. P. C. 146.; and the case of Rolfe v. Harwood, 3. Willf. 497. S. C. on a writ of error, 2. Black. Rep. 937. Cowp. 87. S. C. on an Appeal to Parliament, 7. Brown's P. C.

352. See also Powel on Devises, 540. 3. Atk. 552. 1. Vezey, 32. Swinb. 15.

(b) That a verdict may be amended, see 1. Roll. Abr. 203. 4. Co. 52. Cro. Eliz. 112. 150. Cro. Car. 338. Bunb. 283. Sta. 514. 1197. 1. Willf. 33. Dougl. 746. 1. Burr. 383.

Court;

Trinity Term, 8. Geo. 1. In Chancery.

ANNESLY
against
PALMER.

Court; but the probate of the first being still in force against those who claim under the second (if they desire it), the Court will grant A COMMISSION OF REVIEW in order to set it aside; but if upon such a commission of review the probate of that will should be confirmed by the delegates, there will be an end of the cause, for there cannot be a review upon a review.

Geo. Eliz. 571. *Quare*, For there may be a commission of re-examination to examine the sentence of the delegates.

There was no decree made in the principal case.

Case 7.

Rashfeild against Carelesse.

A devise of five pounds to a sole executor "for the care and pains he may sustain in fulfilling the trusts of the will," excludes him from taking the residue of the testator's personal estate.—NOTE. Parol evidence was admitted in this case, both on the part of the executor and next of kin, to prove the intention of the testator.

S. C. 2. Eq. Abr. 416. 424.
S. C. 2. Peer. Wms. 158.
S. C. 1. Stra. 568.
1. Vern. 473.
2. Vern. 674.
677. 737.
3. Peer. Wms. 9. 550.
3. Peer. Wms. 40.
2. Com. Dig. "Chancery" (3. G. 7.).
1. Brown P. C. 154.

THE TESTATRIX, *Elizabeth Smallman* (amongst other legacies, particularly five pounds to the plaintiff), by her last will and testament devised a legacy of five pounds to the defendant (whom she made sole executor without making him residuary devisee) "for the care and pains he might sustain in fulfilling the trusts in her will."

There being a residuary part of the personal estate after the debts and legacies were all satisfied and paid, the plaintiff, who was of kin to the testatrix, exhibited a bill in this court against the executor, for an account of the personal estate, and to have a distributive share thereof; insisting, that a specific legacy being devised to the executor for his care in seeing the will performed, he shall be deemed as a trustee for those amongst whom the residuary estate ought to be distributed.

WILLIAMS for the defendant. The executor is *prima facie* intitled to the surplus; and something must be shewn to prove the testator's intent that he should not have it; for otherwise the law gives it him. There have been several cases upon this question, how far the devise of a specific sum should bar the executor of the residue. In the case of *Earl Gainsborough* (a), the earl by his will devised a particular sum to his wife (b), and made her executor, but made no residuary devisee, because when the Counsel was drawing the bill, he desired there might be a devise of the surplus to his executrix, but the Counsel would not put in such a devise, telling him that the law of course gave the surplus to the executor; and upon a bill for a distribution, the Counsel giving this evidence, the Court decreed the *residuum* to the executrix, it appearing to be the intent of the testator. In the case of *Baal v. Smith* (c), a husband devised to his wife some plate, and made her executrix, and no devise of the residue; and it was decreed by LORD HARCOURT, that the devise of the plate would not prevent the executrix from having the residue. In the case of

(a) 2. Vern. 252. pl. 240. Martin v. Rebowe, 1. Brown's C. C. 154.
(b) That a wife is barred by a specific legacy from taking the residue, see (c) 2. Vern. 675. pl. 602.

Littlebury

Trinity Term, 8. Geo. 1. In Chancery.

Littlebury v. Buckley (a), in the equity court of the city of London, SIR P. KING, Recorder of the city and Judge of that court, decreed a distribution, there being a particular legacy devised to the executor; but that decree was afterwards reversed in the house of lords on collateral evidence, which they admitted to prove the testator's intent for the executor to have the surplus (b).

RASHFIELD
against
CARELESS

TALBOT on same side. There are several cases where an executor is looked upon only as a trustee for the next of kin, but they are all founded on the supposed intent of the testator, that the executor was only to have the specific sum devised. But there may be cases, where it is reasonable that the executor should have the surplus, as well as the specific sum. It may be presumed, one reason why the testator gave a particular sum, though he intended him the surplus, was, lest there should be no surplus (for personal estate is very uncertain, being always fluctuating), in which case the executor has an equitable as well as a legal right. On this foundation the cases which have been quoted were adjudged. The supposition of the testator's kindness to his next of kin is not so strong as an express declaration of a testator, for which reason the house of lords have admitted collateral evidence as legal proof. As in the case of *Harris v. Bishop of Lincoln* (c), where the testator devised his estate to the right heirs of his mother, and proof was admitted to shew, that he intended it for the right heirs of his grandmother, the estate coming from her family; and this was held not to be contrary to the will; and in last *Easter Term* it was accordingly decreed by the present LORD CHANCELLOR. The statute has no relation to this case, because here is a will; and that act extends only to a dying intestate.

To WHICH it was answered, that the present case is not like any of those before cited. And first, as to the *Countess of Gainsborough's Case* (d), the suit was between the heir at law and the executors, to make the personal estate in her hands to be assets in order to satisfy debts, and so far to discharge the real estate, and proof was admitted to shew, that the earl intended his lady should have all his personal estate in nature of a legacy, though he had given her a specific legacy in the same will. In the case of *Littlebury v. Buckley* (e) the devisee expressed no reason for giving the sum of money, only a devise of so much. The case of *Harris v. Bishop of Lincoln* (f) was no more than a dispute concerning the identity of a person; and in such case parol evidence has been admitted ever since the statute of Distributions. *Baal v. Smith* (g) was a devise to a wife (executrix) of plate which she had before marriage; and it was held, that notwithstanding that legacy, she should have the residue. But a proof *dehors* a will was never yet

(a) 2. Vern. 677.

(b) See the Duke and Duchess of Beaufort's Case in the House of Lords, 2. Vern. 648. pl. 578. 8. Viner Abr. 394 pl. 21. in veris.

(c) 2. Eq. Abr. 416.

(d) 2. Vern. 252.

(e) 2. Vern. 677. See 10. Mod. 99.

(f) 2. Peer. Wms. 137.

(g) 2. Vern. 675. pl. 602.

admitted.

Trinity Term, 8. Geo. 1. In Chancery.

RASHFIELD
against
CARLENESE.

* [11]

admitted. It is true, if a will want an explanation, evidence may be given to * explain it, but never where it explains itself, as in the present case; for what can be plainer than a specific legacy given to one for his care and pains in performing a will. This is a legacy which implies a negative so as to exclude the legatee from any farther demand out of the personal estate, viz. that he shall have so much for his pains, and no more; and so it was held by the present LORD CHANCELLOR in the case of *May v. Lewen* (a). But it would be of dangerous consequence to admit any evidence *dehors* a will, and repugnant to the will itself, because it is in effect laying aside the will of the testator, and making a new will upon such evidence, which was condemned by the Legislature, when the statute of Frauds and Perjuries was made; for to what purpose should any man make a will, if it is in the power of any court to set it aside upon proof of any matter *dehors* the will, and make a decree accordingly (b)?

PARKER, Lord Chancellor, being indisposed,

POWYS, Justice of the king's bench, sat in court, and made the decree.—This is a question upon a will, and it has been *vexata questio*. The case of *Foster v. Munt* (c) was the first case where the Lord Chancellor JEFFERIES was of opinion, that any legacy to an executor occasioned a distribution of the surplus; for otherwise it is giving all and some; the three lords commissioners MAYNARD, KECK, and RAWLINSON, upon a re-hearing of the same cause, reversed the decree; but that last decree was upon appeal to the house of lords reversed, and the first confirmed. In *The Duke of Beaufort's Case* (d), COWPER, Lord Chancellor, decreed

(a) The case of *May v. Lewen* was thus:—*Beatrice Miller*, by her will of 2d December 1717, after payment of her debts, legacies, and funeral, devised all her lands and tenements, and the rents and profits thereof, and the produce of all her money and other personal estate, to the plaintiff and the defendant *Lewen* and their heirs, on trust to sell the said real and personal estate, and pay the interest of the money arising from such sale to her mother for life; and the testatrix then gave some small legacies to be paid after the death of the mother, and appointed the plaintiff and defendant *Lewen* executors of her will, and gave them fifty pounds a-piece for their trouble therein; but she made no disposition of the residue.

—And the Court decreed the executors to be trustees of the residue for the next of kin. Reg. Lib. B. 1720. fo. 196. 2 Peer. Wms. 159. note (1).

(b) Proof was admitted in this case, both on the part of the executor and for the next of kin, to shew the intention of

the testatrix respecting the residue of her estate. S. C. 2. Peer. Wms. 153, 159. But it is said to be the only case in which parol evidence has been admitted in favour of the next of kin. 2. Peer. Wms. 158. note. But parol evidence is constantly admitted in equity in favour of the executors, in order to rebut the presumption which the law raises against their title. *Petit v. Smith*, 1. Peer. Wms. 7. *Granville v. Beaufort*, 1. Peer. Wms. 114. *Batchelor v. Searle*, 2. Vern. 736. *Lake v. Lake*, Amb. 126. *Bracebridge v. Woodroff*, 2. Atk. 68. *Brown v. Selwin*, Cases T. T. 240. *Coote v. Boyd*, 2. Bro. C. C. 525. *Clinton v. Hooper*, 3. Bro. C. C. 201. *Hornsey v. Finch*, 4. Bro. C. C. 239. *Thornton v. Tracey*, 2. Vezey, jun. 465.

(c) 1. Vern. 473. pl. 462. 1. Eq. Cases Abr. 243. pl. 1. 2. Eq. Cases Abr. 433. pl. 8. 443. pl. 57. See also *Martin v. Rebowe*, 1. Brown's C. C. 154.

(d) 2. Vern. 648. pl. 587. 3. Viner Abr. 194. pl. 21. in note.

a distri-

Trinity Term, 8. Geo. 1. In Chancery:

a distribution; but that decree was reversed by the house of lords. In law as well as equity, an executor is esteemed but a trustee; for an executor of an executor is continued executor to the first testator *in infinitum*; but not an administrator of an executor, for the executor had no property in the personal estate to go to his administrator. If a man marry a *feme* administratrix, who dies, he shall not have the goods of her intestate; for there shall be a distribution. This was *Mr. Harcourt's Case* (a) who married *Sir James Aston's* widow. There are many precedents where a specific legacy bars the executor of the surplus. There is a distinction between giving the executor a legacy generally, and specifying the cause for which it is given; for that raises a trust in equity which the executor must perform; it is a trust superadded to the former trust: it is dangerous to admit evidence *dehors*. The best construction is on the will or deed itself; for *litera scripta manet* (b). I once heard it determined, that giving the executor mourning barred him of the surplus. In February 1720, before LORD PARKER, in the case of *May v. Lewin* (c), it was decreed, that in case of a general legacy to an executor, evidence may be admitted, because every thing depends on implication; but otherwise where the cause of the legacy is expressed. The executor, in this case, seems to be considered barely as a legatee.

Let there be a decree for a total exclusion of the executor; let there be a distribution; and to that end let the executor account (d).

(a)

(b) That parol evidence shall not be admitted to contradict a will, see *Brown v. Selwin*, Cases T. T. 240. *Chamberlain v. Chamberlain*, 2. Freem. 52. *Lowfield v. Stonelham*, 2. Stra. 1261. *Hampshire v. Peirce*, 2. Vezey, 217. *Maybank v. Brook*, 1. Brown's C. C. 84. But that it may be admitted to ascertain a person or thing, see *Harris v. Bishop of Lincoln*, 2. Peer. Wms. 136. *Dorset v. Sweet*, Amb. 175. *Bradwin v. Harper*, Amb. 374. *Parsons v. Parsons*, 1. Vez. 166. *Fonnereau v. Pointz*, 1. Brown C. C. 472. *Del Mare v. Rebello*, 3. Brown C. C. 446.

(c) 2. Peer. Wms. 162.

(d) See *Davers v. Davers*, 3. Peer.

Wms. 43. *Joslin v. Brewit*, Bunb. 112. *Southcote v. Watson*, 3. Atk. 228. *Andrew v. Clerk*, 2. Vezey, 162. *Martin v. Rebowe*, 1. Brown's C. C. 154. *Rusldale v. Carleffe*, Stra. 568. *Farringdon v. Knightly*, 1. Peer. Wms. 544. *Rutland v. Rutland*, 2. Peer. Wms. 210. *Wheeler v. Sheer*, Mosley, 288. *Read v. Snell*, 2. Atk. 642. *Bowker v. Hunter*, 1. Brown C. C. 328. *Batteley v. Windle*, 2. Brown C. C. 31. *Lawson v. Copeland*, 2. Brown C. C. 156. *Dean v. Dalton*, 2. Brown C. C. 634. *Clennel v. Lewthwaite*, 2. Vezey, jun. 465.

RASHFIELD
against
CARLESS.

Heron against Newton.

Case 8.

At the Rolls.

THE CASE was, That the testator *Hyd* in last will and testament made two executors, and gave them specific legacies, and by his said will desired them to be kind to one *Sarah Tufton*, his old servant, Where the executor shall have the residuary part free from any distribution.—S. C. 2. Eq. Abr. 440. Ante, 10. Post. 27. 2. Peer. Wms. 160. 2. Atk. 100. 2. Com. Dig. "Chancery" (3. G. 7.).

servant,

Trinity Term, 8. Geo. 1. In Chancery.

HERON
against
NEWTON.

servant, and to give her some small pieces of furniture then in his house, if she desired it.

The question in this case was (as in that last mentioned), Who should have the residue of the personal estate after debts and legacies paid?

* [12]

And IT WAS DECREED, that the executors should have it free from distribution, it being the apparent intent of the testator (a) it should be so; for otherwise they could not be kind to his old servant, or give her any part of his * furniture, if it was not theirs to give, and if he left them no *assets* for that purpose; so that those words are explanatory of what the testator intended.

The bill was dismissed (b).

(a) Proofs were read of the testator's Intention. 2, Peer. Wms. 160. 2. Vezey, Jan. 473.

(b) See Note (1) Peer. Wms. 550.

MICHAELMAS

MICHAELMAS TERM,

The Ninth of George the First,

IN

The Year

1722.

IN

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

Sir Jeffrey Gilbert, Knt. Baron of the Exchequer.

Robert Price, Esq. Baron of the Exchequer.

The Countess-Dowager of Coventry *against* The Earl of Coventry. Case 9.

THOMAS EARL OF COVENTRY being seised in fee of several manors, lands, and tenements, &c. demised the same to trustees and their heirs, to the use of himself for life; remainder to his eldest son *Gilbert* for life, with a power to settle a jointure on any wife he should marry, not exceeding five hundred pounds a-year, so as she brought an equivalent fortune; remainder to the heirs males of the body of the said *Gilbert*; remainder to the present *Earl* (the now defendant), and the heirs males of the body; with several remainders over.

Earl Thomas died; and thereupon *Earl Gilbert*, being seised for life as aforesaid, married the plaintiff, and in consideration of the said marriage, and of ten thousand pounds portion which he had with her, entered into articles, by which he covenanted, &c. for himself and his heirs, to settle lands according to this power, or otherwise, of the value of five hundred pounds a-year on her for jointure; and having asked, and being informed by his steward, which

Where a defective execution of a power was helped inequity.

S. C. Max. in Eq. 19.

S. C. Stra. 596.

S. C. 2. Peer.

Wms. 222.

S. C. Comy. 312.

S. C. 1. Eq. Abr.

348.

S. C. 2. Eq. Abr.

673.

S. C. 10. Mod.

464.

Gilb. E. R. 160.

2. Eq. Abr. 87.

pl. 9. 660. pl. 8.

Powel on Pow.

120.

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which of his lands were the most proper to be settled, a draught of a settlement of lands to that value was drawn and engrossed for him to sign, which lay four years, * and was never executed by *Earl Gilbert*; who afterwards being suddenly taken ill, devised three thousand pounds to the plaintiff, and all his plate, jewels, &c. and two hundred and fifty pounds a-year to be paid to her for life out of other lands, and died without issue-male; so that the said manors, lands, and tenements, came to the present *Earl* (the now defendant), against whom the plaintiff, the *Countess-Dowager*, exhibited a bill in this court to have a specific execution of the said power, and that she may retain the lands mentioned in the said settlement, though not executed by *Earl Gilbert* in his life-time.

AND IT WAS INSISTED for her, that this power given to *Earl Gilbert* (though he had only an estate for life) ought to be favourably construed in a court of equity; for wherever such a power is given to a tenant for life, who would have been seised in fee if it had not been for that deed by which the power itself was created, it shall receive a more favourable construction than if it had been reserved to one who is a stranger to the inheritance by the rules of descent. That it plainly appeared by the proofs in this case, that *Earl Gilbert* certainly intended to execute this power; for by his direction, a deed was drawn for that purpose, which the trustees for the *Countess* disliking at the time the said *Earl* was about to execute it, he sent up to *London* to have another deed drawn, which was done, and returned into the country, and was in the possession of his steward, who being gone from home, the *Earl* died suddenly without executing that deed; so that if it appear to this Court, that *Earl Gilbert* designed to execute it, that shall be taken in equity to be good against the present *Earl*, like a will, which, though not signed by the testator, is good in equity (a) to charge the heir at law in the realty as well as the executor in the personalty.

ON THE OTHER SIDE it was argued, that not to execute a power punctually was the same thing as not to execute it at all; and powers not executed are never helped in this court (b), unless it is to avoid an apparent injury in conscience, though in strictness of law lost; which is not the present case, because it appears, that this lady (the plaintiff) has a very good provision made for her by the will of *Earl Gilbert* her late husband; for he left her a legacy of three thousand pounds, together with the value of two hundred pounds more of his personal estate, which, with the two hundred and fifty pounds settled on her for life, and payable yearly out of

(a) *A feme covert* having a power to dispose of money by will, signed and sealed by her, made a testamentary paper, not sealed, but on a stamp; and the Court held this a good execution of the power, for the stamp is equivalent to sealing, *Sprange v. Barnard*, 2. Brown C. C. 505.

(b) See *Arundel v. Philpot*, 2. Vern. 69. 3. Ch. Cases, 70. *Pigot v. Penrice*, Comy. 250. *Tollet v. Tollet*, 2. Peer. Wms. 489. *M'Adam v. Logan*, 3. Brown C. C. 310.

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certain lands, is a reasonable equivalent for her fortune. * As to the case of a will, that it shall be good in equity, though not signed by the testator, it has its own reasons; for if he write his name in any part of his will, it is a good signing, and wills are commonly made *in extremis*, and for that reason they are favoured in equity. Now in the present case it appears, that *Earl Gilbert* made a will a little before his death, and he might at the same time have executed the deed, if he had intended so to do; but probably he thought, that he had done enough already for the plaintiff, and therefore would not lay any farther charge on the lands. It is true, the plaintiff brought a considerable portion in money, and so came in as a purchaser for a valuable consideration; but that will be no reason to charge the present *Earl*, because none of it came to his use; but if it charge any one, it must be either the heirs or executors of *Earl Gilbert*; for he covenanted, that he or his heirs would settle five hundred pounds a-year on the plaintiff, which could not be by virtue of the power reserved in the will of *Earl Thomas*, because *Earl Gilbert* had only an estate for life, and consequently could not bind his heirs to settle a jointure by virtue of that power; so that if his heirs are bound, it must be in another respect, but the defendant can never be bound as heir, because he is the remainderman in tail. It is true, powers reserved in a voluntary settlement, as this was by *Earl Thomas*, ought to be favourably construed in respect to him who made them; but it is not so where powers are joined to an estate to charge that of a stranger; but yet there are cases where powers reserved in and by a voluntary settlement have not received a favourable construction in this court: as for instance, In the case of the *Earl of Mountague v. Bath* (a), where a power of revocation was reserved in a deed, but it was to be in the presence of three privy-counsellors, and the *Duke of Albemarle*, who had reserved such power, did by his will revoke the deed; but being at that time governor of *Jamaica*, he could not do it in the presence of three privy-counsellors; it is true, this revocation was held good in equity, but it was upon that particular reason, viz. because he could not have three privy-counsellors there. But this Court denied to help the single circumstance of a mistake in the tender of a guinea. So in *Sir Charles Orby's Case* (b), which was thus: *The Earl of Macclesfield* was tenant for life, with a power to make leases for twenty-one years, or three lives, so as the * old accustomed yearly rent was reserved; he made a lease for three lives, without any special reservation, but only yielding and paying the old accustomed rent generally; and this was held a void lease. This Court will not decree the execution of a power to the prejudice of a third person, when the time for executing that power is lapsed. Now a power given to tenant for life to make leases, or to settle a jointure, should be strictly

* [15]

(a) 2. Chan. Rep. 417. 3. Chan. Term, 4. Anne. 1. Eq. Abr. 343. Cases, 55. 68. 90. 2. Com. Dig. 2. Freem. 291. 2. Vern. 531. Rep. "Chancery" (4. O. 4). in Equity, 45. Prec. in Ch. 257.

(b) *Orby v. Lord Mohun*, Easter 3. Chan. Rep. 102.

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See *Hele v.*
Hele, 2. Cases
in Chancery, 28,
29.

construed, because it enlarges the estate for life beyond its natural duration, to the prejudice of those in reversion or remainder. So where a woman made a settlement of her lands, with a power to revoke it at any time in favour of her husband, and she afterwards sent several letters to her lawyer to prepare a deed to revoke that settlement, and to give the estate to her heir, but never executed such deed, this Court refused to make a decree according to what appeared to be her intention by those letters; for the decree ought to be founded on what she had done, and not on what she intended to do.

In the principal case, no decree was now made, the Lord Chancellor taking time to consult the Judges.

Afterwards this case was argued again in *Easter Term*, in the tenth year of *George the First*, before the LORD CHANCELLOR, assisted by THE MASTER OF THE ROLLS and BARON PRICE and BARON GILBERT.

The substance of the arguments for the plaintiff was as follows: This bill was brought to have a jointure intended to be settled on the plaintiff by virtue of a power in the will of *Thomas Earl of Coventry*, which provides, that it shall be lawful for any person who shall be seised, &c. by virtue of the said will, to settle five hundred pounds a-year on any wife he should marry, the bringing an equivalent fortune. The testator died, and *Earl Gilbert*, being seised of the estate for his life, entered into articles to trustees, &c. upon his intermarriage with the plaintiff, by which he covenanted to settle lands pursuant to his power, or otherwise, of the value of five hundred pounds a-year, on her, and got a draught of a settlement to carry the said articles into execution, in which this power was mentioned, and directed, that a mortgage which affected some of the lands should be discharged, in order to make the settlement more effectual; and this bill being brought in the disjunctive, either to be quieted in the possession of the lands mentioned in the settlement thus drawn, or to have satisfaction from the * heir of *Earl Gilbert*, this Court directed an account to be taken what assets of *Earl Gilbert* came to his heirs, which, on the report made thereof, fell short some thousand pounds to satisfy the plaintiff's demands. And thereupon IT WAS NOW ARGUED, that these articles ought to be carried into execution; and the rather, because the plaintiff is a purchaser for a valuable consideration, and the defendant is only a volunteer under the will of *Earl Thomas*, the case being strictly as followeth: Tenant for life, without impeachment of waste, with a power to settle five hundred pounds a-year on any wife he should marry, and who should bring an equivalent fortune, remainder to the defendant, &c. Tenant for life, upon his marriage, entered into articles, by which he covenanted to settle five hundred pounds a-year on his intended wife; and in pursuance of this covenant, a settlement of lands was drawn by his direction, but he died before he executed the said deed: now it is a general rule in equity, that where there is a purchaser for

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for a valuable consideration, on articles only, without any other conveyance, those articles shall be carried into execution ; and as this is often done in the case of an heir, on the articles of his ancestor, so it ought to be done in the present case. And those cases where the Court would not compel the execution of powers are, where it would be against the will of the donor they should be executed. Such was the case of the heir in tail, where this Court would not enforce him to suffer a common recovery, though his father was decreed so to do, and died in contempt for not doing it. It is true, where a power is not executed at all, but totally neglected, there may be some reason for a court of equity not to enforce the execution thereof ; but where it is executed in any part, though not strictly performed, it is the standing rule of this court to make it good. Now, upon consideration of the circumstances of this case, and the solemnity of the transactions, by drawing a settlement pursuant to the articles, and by the express direction of *Earl Gilbert*, this is a good execution of his power in equity. Besides, the strict execution of this power was prevented by an accident ; for *Earl Gilbert* called for this settlement in his last sickness, which was ready engrossed, and in the possession of his steward, who being then gone from home, it could not be had for him to execute before he died, so that the plaintiff has good equity even upon that foot ; and there are * several precedents where articles have been carried into execution against remainder-men ; as the case of the *Lord Burlington v. Clifford (a)* and *Hollingshed v. Hollingshed (b)*, and *Parker v. Parker (c)*, for younger children's portions; and *Alford v. Alford (d)* ; in which last case the person who had the power covenanted to execute it before he had it, and whilst it was in contingency, but it afterwards vested in the covenantor, and not being executed by him, it was carried into execution against the remainder-man ; and so should this.

* [17]

THOSE WHO ARGUED for the defendant admitted, that the plaintiff was a purchaser in the highest sense, and for the most valuable consideration, which is marriage, and a portion in marriage ; yet where she is such a purchaser at large, and of no particular lands, she must take her remedy where the law gives it, and that cannot be of those lands, for certainly she is no purchaser thereof at law. There are three things relied on by her Counsel to make her a purchaser in this court ; and those are, the articles, the drawing the settlement pursuant to the said articles, and the will of *Earl Thomas* ; and that though one of these might not do it, yet *juncta juvant*. It has been said, that every wife who brings an equivalent fortune is a purchaser of those lands under that will and the power thereby created ; but this is a very position, because it is essential that every power should be *ad libitum* of him who has it until it is executed, so that the plaintiff cannot be said to be a

(a) 1. Eq. Abr. 345. 3. Vern. 379.
Rep. in Equity, 167.

(c) Gilb. Rep. in Eq. 168.

(b) 1. Gilb. Rep. in Eq. 167.

(d) Gilb. Rep. Eq. 167. 2. Eq. Abr.
657.

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purchaser under this will and power before that power is executed. And as to the articles so much relied on, and the covenant therein mentioned, to settle five hundred pounds a-year, it is only a general covenant relating to no particular estate or lands; therefore the plaintiff is only a creditor under that covenant at large, which is not like the case of *Hollingshed v. Hollingshed* (a); for there the covenant was tied to the very lands in the power, and there were no other to answer it. It is true, that special forms of words are not necessary in executing powers, and that *infants* and *femes covert* may perform the same, because they are only instruments (b). It is true likewise, that in the *Lord Burlington's Case* there was a general covenant, but it did not rest there, for he settled what he pretended was a thousand pounds a-year, according to the articles, which was afterwards found to be of less value, and appeared so to be by the defendant's answer. * But the case of the mortgagee, who had a decree in this court against the mortgagor (who was tenant in tail) to suffer a common recovery, and died in contempt of the Court in not performing the said decree, yet the Court would not carry that decree into execution against the heir in tail, is a very strong case against the plaintiff, *Lady Coventry*; for in that case the tenant in tail had an implied power to suffer a common recovery, by virtue of that estate which he had in the lands, and he himself might have been compelled to do it if he had been living, but after his death his heir was not; and yet he in a greater measure derived his estate under his ancestor, who was tenant in tail, than the present defendant does under *Earl Gilbert*. It is true, a tenant in tail has power only by implication in law to suffer a common recovery; but there seems to be no material difference between implied and express powers; for wherever the parties are on a level as volunteers, this Court will never interpose to favour one more than the other. It is admitted, that in this case some steps were taken towards a future act, but still all rested in intention; and it seems reasonable to have this power or this covenant carried into execution, if there was no other way by which it might be satisfied; but it is plain there were other means by which it may be satisfied, and that is by the personal assets of *Earl Gilbert*; therefore a specific execution of this power ought not to be decreed.

THE JUDGES who assisted THE LORD CHANCELLOR divided this case into two points:

FIRST, Whether anything was done by *Earl Gilbert* in consequence of this power to make it a *lien* on the defendant, who was a remainder-man.

SECONDLY, If any such thing was done, then whether the defendant has any equity to be reimbursed out of the assets of *Earl Gilbert*.

(a) *Gilb. Eq. Rep.* 167.

(b) *Contra* as to infants, by *VERNEY*,

Mast. of the Rolls. 9. *Viner Abr.* 408.

in note, pl. 1.

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As to THE FIRST QUESTION they held, that *Earl Gilbert* had so far executed the power as to be a *lien* on the estate in the hands of the remainder-man. When powers were first created by the statute 27. *Hen.* 8. c. 10. they were strictly construed at law, and the reason was to avoid recalling and unsettling estates already settled; and probably for the same reason such powers had no countenance in this court. * But the power in the present case, which is reserved to a tenant for life to raise an estate, is part of the old dominion which the donor had over his estate, and agreeable to his intention at the very time he made such reservation; and therefore should have a favourable construction in this court. That the price here given (*i. e.*) the portion paid, and the articles executed, are a complete conveyance, and a good execution of this power; and that ever since the execution of these articles, *Earl Gilbert* was a trustee for the plaintiff, and such trust is assignable and devisable in this court. That there is but one case cited at the bar against this opinion, and that is the case of a mortgagor, who was tenant in tail, and was decreed to suffer a common recovery, but died in contempt of that decree, and this Court would not carry it in execution against the heir; but the reason may be, because the heir, after the death of his ancestor, was in by the statute *De Donis*, which this Court could not controul; but if the ancestor had been *cestuy que trust* in tail, his heir would have been bound by such ancestor's lien, because in that case he would not have been in by that statute. It has been argued at the bar, that these articles shall not be carried into a specific execution in favour of a volunteer, when there is a plain remedy to be had on the covenant for damages; but that is only where a man is *ad libitum* to perform it or not. If the trustees by the marriage-articles had exhibited a bill in this court to have a specific execution thereof, it would certainly have been decreed for him; and so ought it to be for the plaintiff, especially since the power created by the will of *Earl Thomas* covers all the estate which he settled by that will. Upon the whole, it might be hard for a court of equity to carry the settlement alone, thus drawn and engrossed, into the execution of this power exclusive of the articles, because the statute of Frauds now stands in the way; but this power being bound by the articles, the very draught of that settlement is a good designation of what lands should be settled, and a determination of *Earl Gilbert's* election to raise the five hundred pounds a-year out of, and by virtue of, his power.

Say v. Freeland,
2. Vent. 350.

As to THE SECOND POINT, which is, Whether the defendant has any equity to be reimbursed out of the assets of *Earl Gilbert*, (*i. e.*) how far those articles will bind his heirs? And as to that matter, the words are to be considered, *viz.* "that he or his heirs" "would settle lands of the value of five hundred pounds a-year, by "virtue of his power, or otherwise:" now it has been said at the bar, that these are technical words written *currente calamo*, and inserted in the articles without consideration; but this seems to be a

* [20]

2. Com. Dig.
67d.

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mistake, for the words were carefully put in as auxiliary to the real lien, viz. that if his power should happen to be insufficient to settle five hundred pounds a-year, that then it should be done by some other means; and it is probable this marriage had never taken effect but in consideration of this power; so that the assets of *Earl Gilbert* shall not come in exoneration of the settled estate; for wheresoever assets are brought in exoneration, there the debt originally charged the personalty. It is true, he had election to raise this five hundred pounds a-year out of his own assets, or out of his power; but it seems plain, that he intended to raise it out of his power; for here was a deed drawn and engrossed, though not executed, by which deed the lands therein mentioned, being of the value of five hundred pounds, were settled on the plaintiff in jointure; so that this initiate act, though not consummate, is sufficient to shew his intention to execute this power, which he was bound by the articles to perform; but if it had been *ad libitum*, there an initiate act would not have been sufficient.

IT WAS DECREED for the plaintiff, that she was a purchaser of this five hundred pounds a-year under the will of *Earl Thomas* and the articles of *Earl Gilbert*; and that though this power was not strictly performed, yet here being a valuable consideration, it shall be carried into execution in this court; that the articles are a sufficient lien in equity to carry it into execution; and this being a lien ever since the articles were executed, there can be no colour to charge the assets of *Earl Gilbert*.

SO IT WAS DECREED, that the plaintiff should have those very lands specified in the deed (a).

(a) For instances in which a court of equity will supply defective execution of powers, see *Pollard v. Grenvill*, 1. Ch. Cases, 10. 1. Ch. Rep. 184. *Smith v. Ashton*, 1. Freem. 308. *Fothergil v. Fothergil*, 2. Freem. 256. *Garth v. Blansfey*, *Gilb. E. R.* 169. *Tollet v. Tollet*, 2. Peer. Wms. 489. *Harvey v.*

Harvey, 1. Atk. 562. *Götter v. Layer*, 2. Peer. Wms. 622. *Holt v. Holt*, 2. Peer. Wms. 648. *Wade v. Paget*, 1. Brown C. C. 363. *Sneed v. Sneed*, Amb. 64. *Wilson v. Piggott*, 2. Vezey, jun. 351. *Jackson v. Jackson*, 4. Brown C. C. 467.

E A S T E R T E R M,

The Ninth of George the First,

I N

The Year

1722,

I N

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

* [21]

* The Earl of Strafford *against* Lady Wentworth.

Case 10.

SIR JOHN SMITH, being tenant for life, made a lease for years, rendering rent, payable on such a day, and afterwards died about two of the clock in the afternoon of that day on which the rent was payable. The tenants having paid the rent to *Lady Wentworth*, who was the next in remainder, the plaintiff took out administration to the intestate *Sir John Smith*, and then exhibited his bill in this court to oblige the defendant, who had wrongfully received the rent, to pay it over to him, alledging, that the rent was due to the intestate in his life-time.

IT WAS INSISTED *for the defendant*, that the rent was not rightfully due to the intestate until twelve of the clock of that night, though it is demandable before sunset, for the benefit of the tenants, to save a condition, &c. for it is not legally due to the landlord until the last minute of that day on which it is payable; and the tenants having paid it to the defendant, who had a right to the remainder, in whose time it incurred and became due, the plaintiff cannot recover it from her, unless he shew that it vested in the intestate. To prove this point, the case of *Lord Rockingham (a)* was cited, where the lessor died on *Michaelmas-Day* in

If a tenant for life make a lease for years, reserving rent at *Lady-Day* and *Michaelmas*, and die intestate about two o'clock in the afternoon on *Michaelmas-Day*, and the tenants pay the rent to the remainder-man, this is an admission that it is due to the intestate, and the Court will order it to be paid over to the administrator.

S.C. Prec.Chan. 555.

1. Peer. Wms. 180. 392.

(a) Lord Rockingham v. Oxendon, 2. Salk. 578. Will. Rep. 177. pl. 43.

THE EARL OF
STRAFFORD
against
LADY
WENTWORTH.

the afternoon, and before the setting of the sun, and it was insisted for the *executor, that the rent being reserved payable on that day, it might have been paid in the morning, and that a release upon such payment had been a good discharge, but it was decreed in that case, that the rent should go to the heir, because at the time of the death of the lessor he had no remedy to compel the payment, and by consequence it was not vested in him until the last minute of that day.

THE COURT. The single question is, Whether this rent was due to the intestate or not? for if it was, then the plaintiff, who is his administrator, ought to have it. It is true, that it was not due from the tenants until the last minute of the day on which it is payable, neither could they be compelled to pay it until after that day; but they having paid the rent, they admitted it was due from them, and it is plain the defendant had no right to receive it; therefore it being paid into a wrong hand, who received it without any title, it ought to be paid over to the plaintiff, who had a colourable title to receive it as administrator of the intestate (a).

(a) By 11. Geo. 2. c. 19. § 15.
“ Where any tenant for life shall happen
“ to die before or on the day on which
“ any rent was reserved or made payable
“ upon any demise or lease of any lands,
“ tenements, or hereditaments, which
“ determined on the death of such tenant
“ for life, the executors or administra-
“ tors of such tenant for life shall recover,
“ in an action on the case, of and from
“ such undertenant or undertenants of

“ such lands, tenements, or heredita-
“ ments, if such tenant for life die on
“ the day on which the same was made
“ payable, the whole, or if before such
“ day, then a proportion of such rent,
“ according to the time such tenant for
“ life lived of the last year, or quarter of
“ a year, or other time in which the said
“ rent was growing due as aforesaid,
“ &c.”

TRINITY TERM,

The Ninth of George the First,

I N

The Year

1722,

I N

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

Descarlett against Dennett.

Case 11.

DENNETT made a lease to *Descarlett* the complainant for certain lands at *Walthamstow*, in *Essex*, for nine years, rendering three pounds ten shillings a-year, with a clause of re-entry for non-payment of the rent or non-performance of covenants; in which indenture was a particular covenant, that the plaintiff should not suffer persons to make use of a way over part of the lands demised; notwithstanding which covenant, the plaintiff put up a gate at the entrance into the close, and permitted any person to pass over the way, requiring them to pay. For breach of which covenant, and for non-payment of the rent, the lessor brought an ejectment, and had judgment. He also brought several other actions, which seemed to carry an appearance of vexation.

Bill in chancery will not lie to be relieved against a wilful voluntary breach of covenant or condition. Post. 91. 113.

To be relieved against which judgment in ejectment, the lessee brought his bill in this court, offering to pay the rent, and satisfy the lessor for the damages in breaking the covenant.

But the bill was dismissed by *SIR JOSEPH JEKYLL, Master of the Rolls*; for the court of chancery cannot relieve the non-performance of a covenant or condition, the prejudice in breach of which cannot be estimated by damages. This tends to the prejudice of the inheritance, inasmuch as it may hereafter amount to an evidence

Trinity Term, 9. Geo. 1. In Chancery.

DECARLETT
against
DENNETT.
See stat. 4. Geo. 2.
c. 28.

evidence for a prescription over the close. The case of an entry for non-payment of rent is very different; for there the loss is certain, and may be recompensed by damages. This has been a settled rule in equity.

Wherefore the bill was dismissed.

MR. LUTWYCHE, *for the plaintiff*, argued, that it is hard for his client to lose his lease, when he is willing to make recompence.

But by THE MASTER OF THE ROLLS, It is owing to his own covenant, and to a wilful voluntary breach thereof, against which this Court cannot relieve (a).

(a) That the court of chancery will not relieve against a covenant where, on the performance or non-performance of the act to be done or omitted, the party is to pay a sum by way of *liquidated damages*, see *Small v. Fitzwilliam*, Prec. Ch. 102. *Woodward v. Giles*, 2. Vern. 119. *East India Company v. Blake*, Finch, 117. *Ponsonby v. Adams*, 6. Bro. P. C. 417. *Rolfe v. Paterfon*, 6. Brown P. C. 470.

Lowe v. Peters, 4. Burr. 2228. *Legard v. Hodges*, 3. Brown C. C. 534; and that the Court will relieve where the penalty is intended merely to secure the enjoyment of a collateral object, see *Slowman v. Walker*, 1. Brown C. C. 418. *Hobson v. Trevor*, 2. Peer. Wms. 191. *Parker v. Wilson*, 10. Mod. 517. *Chilliner v. Chilliner*, 2. Vezey, 528.

* [23]

Cafe 12. * The Ducheſs of Marlborough *againſt* Sir John Vanburgh and Others.

Where, after an account ſtated, the parties were decreed to account again before a maſter.

S. C. 2. Eq. Ab.
11.
2. Chan. Cafes,
32.
1. Vezey, 163.
1. Vern. 179.
465.
2. Com. Dig.
“ Chancery ”
(2. A. 8.).

AFTER the battle of *Blenheim*, the parliament was ſo well ſatisfied with the conduct of the *Duke of Marlborough* in obtaining a victory there, that a vote paſſed the lower houſe, that ſomething might be done by the public for *the Duke*, to perpetuate the memory of that ſervice; and at length it was reſolved, that *BLenheim-Houſe* ſhould be built for him at the expence of the public; and, purſuant to that reſolution, THE QUEEN by her officers agreed with workmen to build that houſe. But after laying out two hundred thouſand pounds in building it, *the Duke* fell into ſome diſgrace, and was charged to give an account what money he had received of the crown, and how he diſburſed it, and the building was no longer carried on at the public expence, but at the expence of *the Duke*; and at that time there was forty-five thouſand pounds due to the overſeers of this building and their workmen; and they who ſettled the accounts (a) with them had but ſixteen thouſand pounds of the public money in their hands, to ſatisfy that debt which they had paid; ſo that there was twenty-nine thouſand pounds due to them, as the account then ſtood, for which they exhibited a bill in THE EXCHEQUER *againſt the Duke*, and had a decree in their favour.

(a) Mr. Craggs, Mr. Sloper, Mr. Lownds.

And

THE
DUCHESS OF
MARLBOROUGH
against
SIR JOHN
VANBURGH
AND OTHERS.

And now upon an appeal in THE HOUSE OF PEERS it was insisted, that the decree ought to be repealed, for that *the Duke* * was not obliged to pay this debt, being a stranger to the vote of the house of commons for building this house, and being then out of the kingdom, and never intended to lay out above forty thousand pounds in building a house for himself, which he had already laid out in carrying on and finishing the building thus begun by the public. Besides, it did not appear that there was any manner of contract made by him, or by any other person by his order or authority, with the workmen, &c. to carry on this work; therefore they ought to take their remedy where by law they could. It was farther said, that now the house was built it was of no real benefit to the appellant, because it was so very large, that the furnishing and keeping it in repair would rather be an incumbrance than a profit to any subject; so that there could be no colour to enforce the appellant to pay this debt.

IT WAS INSISTED for the respondents, that they were workmen and tradesmen, and that they built this house in expectation of being paid for their goods and labour; and having no means to compel the payment any otherwise than by applying to *the Duke*, though all their contracts were made with public ministers, it would be a very great hardship if they should be unpaid, and such a hardship as the circumstances of some of them and their families could not bear; and therefore it would be more reasonable, that the appellant (who enjoyed this house and had the inheritance thereof) should pay for it, though there was no special contract to charge him, than that the respondents should be without any manner of remedy for their money.

And it being made appear, that the appellant very often approved the building, and gave particular instructions to some of the respondents concerning the same, they had the said decree affirmed in the house of peers, and that *the Duke* should pay this debt.

Afterwards THE ATTORNEY-GENERAL moved the Court, that *the Duke* might be at liberty to file this present bill against the defendants, for that the account settled by *Mr. Craggs*, *Mr. Sloper*, and *Mr. Lowndes*, who were employed by the public, ought not to conclude him; the rather, that since they had no power from *the Duke*, there was no reason their account should bind him; and for that since he had carried on the work on his own account, it was done at a much cheaper rate in every article than when the public was to pay for it; and now, since the house of peers had decreed he should pay the workmen, it was reasonable he should have a fair * account from them, and vouchers should be produced to the same, especially since it does not appear, that THE HOUSE OF LORDS, who affirmed the decree, ever intended that he should be concluded by the stated account.

* [25]

And though this motion was strongly opposed, yet it seemed reasonable to THE COURT to grant it.

And

Trinity Term, 9. Geo. 1. In Chancery.

THE
DUCHESS OF
MARLBOROUGH
against
SIR JOHN
VANBURGH
AND OTHERS.

And thereupon the now plaintiff filed the said bill, the scope of which was, that the plaintiff might have an account of what money the defendants had received for their work in building *Blenheim House*, and to know what is fairly and justly due to them respectively, in order that the same may be paid.

One of the defendants, who was an overseer of this building, by his answer, says, that he is not to account with any but the crown; and having already accounted, he insists, that he ought not again to be called to account for the same thing; and all the defendants say, that they took *the Duke* to be their paymaster, &c.

At the hearing the cause it appeared, that in the warrant to the overseers of this building to proceed in the work, it was expressly mentioned, that they should be accountable to none but to *the Duke of Marlborough*.

Therefore IT WAS INSISTED for the plaintiff, who is executrix of *the Duke*, that she should have their account. It is true, there is a great demand made by *Sir John Vanburgh*, but there is no reason that the plaintiff should be saddled with it, because he was an officer for the crown, from whom he had a pension to oversee this work; but if the Court should be of another opinion, then it must be considered how much he must be paid, for he insists on six hundred pounds a-year for himself, and three hundred pounds a-year for his assistant, which is very extravagant, because *Sir Christopher Wren*, who was generally esteemed the most experienced architect in England, had but two hundred pounds a-year for overseeing the building of *St. Paul's Church*; and though these officers and workmen say for one another, that the bills delivered and allowed in the stated account are reasonable, yet there is a convincing proof of the falsity of that assertion, viz. that since *the Duke* carried on this work at his own charge, it was done at twenty per cent. cheaper, in every article, than it was carried on before. Besides, it will appear in proof, that the crown paid for several things which were never done, and that there were several frauds committed by the overseers and workmen: as for instance, there were six hundred half-bricks delivered in, * and reckoned at eight hundred whole bricks; and that when these officers wanted fruit, they ordered the grocer to send it, and then charged it as candles burnt in carrying on the building; therefore, though there is an account settled with THE CROWN, it is unreasonable it should conclude *the Duke*, who is a stranger to it, and is now become chargeable in his own right.

* [26]

They who opposed the plaintiff said, that as to the officers, and particularly as to *Sir John Vanburgh*, that by virtue of the decree made in THE HOUSE OF LORDS, the workmen who were employed by him ought to be paid by *the Duke* from the nature of the warrant; and certainly the same reason will oblige him to pay *Sir John*, who employed them, unless some cause can be shewed why the warrant should be effectual to the workmen, and not to the officers by

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by whom they were employed. It is true, *Sir John* was an officer of the crown, and as such he received a constant salary, but that will not oblige him to serve every private man on that account, but rather to have a greater reward when he is employed by a subject; because, to be employed by THE CROWN is such an approbation of his merit, that he must be esteemed in a superior degree than others of the same profession. It is true likewise, that *Sir Christopher Wren* was a very great architect, and had no more than two hundred pounds a-year for overseeing the building of the cathedral of *St. Paul's*; but he lived in *London*, and had several other works carrying on there at the same time, whereas *Sir John Vanburgh* was exposed to the fatigues of long journeys to *Woodstock*, and at the expence to have constant lodgings there.

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DUCHESS OF
MARLBOROUGH
ROUGH
against
SIR JOHN
VANBURGH
AND OTHERS.

And as to the workmen, most of the arguments of their Counsel turned upon the hardship it would be for them to come to a new account before a master in chancery, for so great a sum as it has cost for the building this house, and to produce vouchers for every particular after such a length of time. Besides, several of the present defendants were the widows, children, and other representatives of the deceased workmen; so that it would be almost impossible for them to produce vouchers for the work done by those whom they represent, after so long an acquiescence under the stated account, upon which they might so much rely as to make them remiss and *negligent of such vouchers, that probably great part of them might be lost.

* [27]

BUT THE COURT, after enumerating some of the great actions of the late *Duke of Marlborough*, who carried every thing he undertook by the strength of his great conduct and courage, DECREED, that the officers and workmen should come to an account before a master, and that the stated account should not stand in the way.

Hutchinson and Another against Vincent.

Case 13.

THE PLAINTIFF had a brother who, as it was suggested in the bill, died seised of a real estate, and possessed of a personal estate of great value, and by his last will and testament devised several legacies to particular legatees, and made the defendant *Vincent* executor, and died, against whom the plaintiff and his sister exhibited this bill to have the real estate, and their distributive shares of the personal estate, or of the residuary part thereof after debts and legacies paid.

Where an executor hath no specific legacy devised to him, he shall have the residuum of the personal estate after debts and legacies paid.

S. C. 2. Eq. Ab.

441.

Ante, 9. 11.

2. Vern. 104.

361. 425.

1. Pr. Wms. 554.

3. Pr. Wms. 193.

2. Com. Dig.

"Chancery"

(3. G. 7.).

The defendant by his answer sets forth, that the testator, by his last will, devised a legacy of fifty pounds to his brother the now plaintiff, but left nothing to the other plaintiff his sister; and that he made the defendant executor, but left no specific legacy to him; so he insists, that he as executor is entitled to the residue of the personal estate of which the testator died possessed, and denies that he

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HUTCHINSON
AND
ANOTHER
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VINCENT.

he was seised of any real estate, or, if he was, the defendant dis-claims all manner of right to it.

THOSE WHO ARGUED *for the plaintiff* insisted, that though the defendant is made sole executor by this will, which after a long contest is now established, yet, as this case is circumstanced, the defendant ought not to have the whole personal estate, but shall be presumed as a trustee for the next of kin of the testator, unless it can be shewed that it was his intent his executor should have the whole. Now by this will it stands indifferent, whether the testator intended the benefit should be either for the defendant, who was his executor, or for his next of kin; but it is in proof, that he very often expressed a great regard for his brother and his children; therefore it cannot be presumed he intended his estate for a stranger.

* [28]

IT WAS ARGUED *for the defendant*, that nothing appears upon the face of this will to induce the Court to intend the * defendant to be a trustee for the next of kin; therefore the presumption must be, that he intended the estate for the defendant; and though there are few cases in point, yet the reason which governs some other cases of the like nature may likewise govern this; but there is no case to prove, that an executor is a trustee barely by being appointed executor. And it may be some reason to induce the Court to decree in favour of the defendant, when it shall be considered what vast expence he has already sustained in the contest of this will: for first, the plaintiff contested it in *Dofors-Commons*; and after sentence there for the will he appealed to the delegates, where that sentence was affirmed; then he indicted several of the witnesses for perjury, who proved the will, and they were all acquitted, there being no colourable proof against them; so that having been defeated at law, and in the spiritual court, he now makes his last attempt in chancery.

Foster v. Munt,
1. Vern. 475.
Ante, 11.

THE COURT. An executor has certainly the whole and entire right to the testator's personal estate both in law and in equity, unless upon the face of the will it appear, by some indications, that the testator intended to the contrary, as by giving him a specific legacy; for by such a devise it appears, that he intended him no more. And this was laid down as a rule when JEFFERIES was Chancellor, and with good reason, and has been a standing rule in the court ever since (with some little variations and exceptions from the circumstances of cases) to exclude the executors. But the executor in the present case having no specific legacy devised to him, it does not appear but that the testator intended the whole personal estate to him (a).

Therefore this bill was dismissed, but without costs, upon condition the plaintiff shall not trouble the defendant with any farther demands.

(a) See *Rashfield v. Careless*, ante, p. 550 where the cases on this subject are collected; and the case of *Clennel v. Heron v. Newton*, ante, 11.; note (1) to Mr. Cox's Peer. Will. 5th edit. Lewthwaite, 2. Vezey, jun. 465.

Spencer *against* Chase.

Case 14.

THIS was a bill exhibited by the plaintiff against the defendant, to have an account of what was really due to him, and to have a reconveyance of the estate upon payment of the money, &c.

If *A.* buy from *B.* a minor, under circumstances of distress, the reversion of a house worth forty pounds a year for a hundred pounds, and sell it again in a few days for two hundred pounds, equity will compel *A.* to account with *B.* for the difference.

The bill sets forth, that the defendant had imposed on the plaintiff when under age, and had got several bargains made between them, which he compelled the plaintiff to execute * since he came of age, and particularly a mortgage of a house in *Russel-Street*, in *Bloomfury*, which the defendant now claims as an absolute sale; and that he persuaded the plaintiff to mortgage other lands to him, the defendant, to secure the repayment of six hundred and forty pounds, when, in truth, he, the plaintiff, never received above three hundred and twenty pounds of him upon any account whatsoever.

The defendant by his answer denies any trust of the house in *Russel-Street*, but insists, that it was an absolute sale thereof to him; and as to the mortgage-money, he could not remember the several sums he had paid to the plaintiff, but affirmed that he had paid several sums to him, and discharged several of his notes to other persons, but cannot tell when, or to whom such notes were payable, or who were witnesses to them, having cancelled them at the time he took this mortgage for his security; but that he had actually paid to the plaintiff one hundred and one pounds ten shillings, and sixty pounds more, and delivered a chaise to him, in all to the value of two hundred pounds and upwards, but denies any imposition on the plaintiff; and insists, that he may be allowed two hundred and ten pounds the plaintiff had of him, over and above the six hundred and forty pounds secured by the mortgage, besides his charges and bills of fees and expences, as an attorney for the plaintiff, which were not yet made up, but insists that they should be allowed on the account.

IT WAS ARGUED for the plaintiff, that from the nature of this transaction he had a very hard case; for it appeared in the cause, that he was an attorney's clerk, and being very extravagant, was encouraged, supported, and supplied by the defendant in that way of living, he being another attorney in the neighbourhood, and who knew the plaintiff was entitled to the said house and lands whilst under age; and having been supported in his extravagancies with several small sums of money at several times by the defendant, he threatened this young man, as soon as he came of age, to send him to gaol if he did not repay the money; and thereupon he extorted from him both this conveyance of the house in *Russel-Street*, and the mortgage of his other land (*a*). Now this house is very well

(*a*) See *Stapleton v. Stapleton*, 1. Atk. C. C. 633. *Fox v. Macreth*, 2. Brown 10. *Crow v. Ballard*, 3. Brown C. C. C. C. 400. *Dungey v. Angove*, 2. Vesey, 120. *Delcraim v. Brown*, 3. Brown jun. 304.

tenanted,

Trinity Term, 9. Geo. 1. In Chancery.

SPENCER
against
CHASE.

tenanted, being a good house, and let for forty pounds *per annum*; and the plaintiff, who was entitled to the reversion after the death of an old life then in being, sold it to the defendant for a hundred pounds, who within a few days afterwards sold it to one *Hucksley* for two hundred pounds.

• [30]

* And as to the *mortgage-money*, even the defendant cannot shew any particulars of money paid by him, more than the plaintiff has set forth in his bill; so that he must come to an account for that money, and ought likewise to account for the profits of the house in *Russel-Street*, notwithstanding the pretended conveyance thereof was made by him after he came of age, because it was extorted from him in the manner as already mentioned.

But as to that matter,

IT WAS ANSWERED by the defendant's Counsel, that there was no colour to make him account for the profits of the house in *Russel-Street*; for though *Hucksley* gave him two hundred pounds for it in a little time after he, the defendant, bought it of the plaintiff, yet that was a great deal more than the real value, it being bought for the conveniency of the purchaser, whose house was contiguous, and that there was no colour to avoid the sale thereof, because there was no manner of proof that the plaintiff was imposed on or circumvented.

And as to the *mortgage-money*, there being a cross-bill exhibited against the plaintiff, he owns in his answer, that he had received several considerable sums of the defendant; therefore if he, the defendant, shall be made subject to account, and it being very hard to prove every particular disbursement made by him in behalf and for the use of the plaintiff, it may be reasonable that he should be examined upon interrogatories, and that the defendant's bill of costs, and all other his demands, may be brought into the account and allowed.

If a father devise lands to trustees and their heirs until his son attain the age of twenty-five, a mortgage made by the son when only twenty-one is void.

But upon reading the will of the plaintiff's father, which was his title to the mortgaged lands, it appeared to be a devise of the said lands to trustees and their heirs, until the plaintiff came of the age of twenty-five years, and then in trust for him and the heirs of his body, remainder to the right heirs of the father.

And it appearing that the plaintiff was not of the age of twenty-five years when he executed this mortgage, but of the age of twenty-one years, and no more, so that expressly by his father's will he was not to take until four years after the mortgage was made,

THE COURT was of opinion, that it was void in law; for if it was a contingent and executory devise to the plaintiff, it is plain he had no title until the contingency should happen; but if the estate-tail was executed in him, then he might make a title by suffering a common recovery; but let it be either way, he was

now

Trinity Term, 9. Geo. 1. In Chancery.

now of age, and ought to pay or secure what is justly due to the defendant.

SPENCER
against
CHASE.

* But as to *the sale* of the house in *Russel-Street*, it was an imposition on the plaintiff, for the defendant bought it for less than three years purchase; therefore he ought to make an allowance for what he sold it more than he paid for it to the plaintiff (a).

* [31]

AND *the mortgage* was decreed to stand as a security for what should appear to be justly due to the defendant, of which the master was to take an account, and that the plaintiff should have his costs to this time, to be deducted out of what shall appear to be due to the defendant; and that upon payment thereof the defendant shall reconvey.

But upon non-payment the plaintiff shall suffer a common recovery for the defendant's security, and be foreclosed according to his prayer in the cross-bill: and if the defendant is willing to be at the charge, the plaintiff shall suffer a recovery immediately, lest the defendant should die before what is due to him shall be paid.

(a) *Herne v. Meeres*, 1. Vern. 465.
Chesterfield v. Jansen, 2. Vezey, 125.
S. C. 1. Atk. 301. *James v. Morgan*,
1. Lev. 111. *Buxton v. Lister*, 3. Atk.
383. *Willis v. Jernegan*, 2. Atk. 251.
Stanhope v. Cope, 2. Atk. 231. *Baldwin v. Rochford*, 1. Will. 230. *Barny v. Beale*, 2. Ch. Cases, 136. *Twissleton*

v. Griffith, 1. Peer. Wms. 310. *Clarkson v. Hanway*, 2. Peer. Wms. 203.
Osmond v. Fitzroy, 3. Peer. Wms. 129.
Astley v. Reynolds, 2. Stra. 915. *Barker v. Vansomer*, 1. Brown C. C. 149.
Heathcote v. Paignon, 2. Brown C. C. 167.

Bertie against Lord Chesterfield.

Case 15.

At the Rolls.

THE PLAINTIFF, *Mr. Bertie*, was desired (as suggested in the bill, but not proved) by the late *Earl of Caernarvon* to see his lady buried; and thereupon the plaintiff employed an undertaker of funerals to bury the said lady, expecting to be repaid what he should lay out in the funeral expences by the defendant the *Earl of Chesterfield*, to whom the *Earl of Caernarvon* had devised six thousand pounds a-year, subject to the payment of his debts; but he refusing to pay the said charges, the undertaker brought an action at law against the now plaintiff, and recovered two hundred and seventy pounds for this burial.

The estate of a husband in the possession of his devisee is liable to the funeral expences of the testator's wife, although she lived apart from him on a separate maintenance.

Thereupon the plaintiff exhibited a bill in this court against the defendant, to discover assets in his hands of the *Earl of Caernarvon's* estate, and to subject the same to the payment of this money for the burial of his lady.

S. C. 2. Eq. Ab. 152. 483.
Ch. Caf. 81.
1. Vern. 143. 309. 326.
2. Com Dig. "Chancery" (2. M. 7.)

It appeared in this cause, that there was a settlement of *separate maintenance* made for this lady, and that she had power to dispose it by will; and that accordingly she made a will, and thereby devised several legacies to persons therein mentioned, and constituted the now plaintiff executor thereof.

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But

BERTIE
against
LORD
CHESTER-
FIELD.

BUT IT WAS INSISTED for him, that settlements for *separate maintenance* shall never extend to funeral charges ; and though the lady had made a will, and the plaintiff * executor, yet it appeared she had given away more than she had to dispose.

IT WAS SAID for the defendant, that since the plaintiff was made executor, and had of his own accord taken upon himself the burial of the testatrix, there could be no reason to charge the defendant, for there could be no equitable charge on my *Lord Caernarvon's* estate in the defendant's hand, unless the plaintiff was desired to oversee and take care of this burial of his lady.

And although that did not appear to be the case, yet because the plaintiff took nothing of her estate by being made executor, for she gave away the whole in legacies, IT WAS DECREED, that the husband's estate is subject by law to pay the funeral expences in burying the wife, therefore the plaintiff shall be reimbursed out of *Lord Caernarvon's* estate in the defendant's hands, together with his costs at law, and in this court.

But his bill was dismissed with costs, as far as it related to the undertaker, who was made a party to this suit.

Case 16.

Lawly against Lawly.

Lands were settled in marriage on trustees, &c. that if the wife survived, then she should receive the profits as they were then let ; the husband made leases, and advanced the rent. DECREED, that the heir at law shall have the advanced rent. S C. 2. Eq. Ab. 578.

SIR FRANCIS LAWLY had issue *Sir Thomas*, who had issue *Sir Thomas*, the now plaintiff. The said *Sir Francis*, upon the marriage of his son *Thomas*, settled several lands on trustees, &c. in trust for the said *Sir Francis*, during his life ; remainder to his son *Sir Thomas* for life ; remainder to the first and every other son and sons of *Sir Thomas* in tail male, with a power to either of them, when in possession, to make leases of any part of the said lands for twenty-one years, or three lives ; provided, that if *Lady Lawly* should survive *Sir Francis* and *Sir Thomas* her husband, then in trust to permit her to receive the rents and profits of these lands during her life, as the same were at that time let. *Sir Francis* died, and *Sir Thomas* entered and let those lands at an advanced rent, and died. *Lady Lawly* his wife received the said rent during her life, for several years, and made her will, and the defendant executor thereof, and died.

And now the plaintiff exhibited this bill as heir at law to *Sir Thomas* and *Sir Francis* his grandfather, to have an account of the executor of the *Lady Lawly* of the overplus of the rent received by her in her life-time, and what has been received by the said executor since her death, and that it may * be paid to him, for that he is entitled to it as heir at law as aforesaid.

The defendant answers and says, that if *Lady Lawley* received more than she ought, it was above fourteen years since ; so pleads the *statute of Limitations* ; and if that should not be allowed, then he says that he has not *assets* but what is sufficient to answer debts of an higher nature affecting the same.

But

Trinity Term, 9. Geo. 1. In Chancery.

But THE DEFENDANT WAS DECREED to account, and that what shall appear to have been received by *Lady Lawley* more than she ought to receive (being the improved rent) shall be paid to the plaintiff out of her assets; and what has been received by the executor since her death shall be paid out of his assets.

LAWLEY
against
LAWLEY.

And as to the *statute of Limitations*, the plea was disallowed, because the estate in law was in trustees.

Statute of Limitations no good plea, where the estate in law is in trustees. — S. C. 2. Eq. Abr. 71. Bunn. 60.

And the defendant was ordered to pay costs.

in trustees. — S. C. 2. Eq. Abr. 71.

Carrick and Others against Errington.

Case 17.

THIS was a bill exhibited by the plaintiffs, *Carrick* and two others, as heirs at law to *Edward Errington*; and it was to avoid and set aside a conveyance obtained by the defendant by fraud, suggesting, that the said *Edward* was a weak man in his intellects, and that he conveyed the lands, &c. to trustees and their heirs, in trust for *Thomas Errington*, for life; remainder in trust to his first and every other son in tail male; remainder to *William Errington* in like manner; and all this in consideration only of two hundred pounds; for which reason it appeared to be a fraud and imposition on the said *Edward*.

Where papists are not disabled by the statute 11. & 12. Will. 3. c. 4. to bring their bill in equity.

S. C. Annally, 97.
S. C. 2. Eq. Ab. 623, 624, 625.
S. C. 3. Brown P. C. 412.
S. C. 2. Peer. Wms. 361.
S. C. Moseley, 8.

The defendant pleaded, that two of the plaintiffs are *papists*, and consequently disabled to bring this bill by the statute 11. & 12. Will. 3. c. 4. for that they cannot take by descent from their ancestor; and as to the other plaintiff, there is nothing in the case but what may be tried at law, viz. what was the consideration of this conveyance; and it is plain, that the defendant *Errington* was eighteen years of age, and upwards, when the aforesaid statute was made, consequently not within the penalties; therefore it ought to be tried at law, whether the plaintiffs are capable to recover, or the defendant capable to take by this conveyance; for it is probable that it may appear, *Edward* had some other consideration * to make this conveyance besides the two hundred pounds therein mentioned.

* [34]

But admitting the first limitation to *Thomas* is void, he being incapable to take because he was a *papist*, yet the limitation over to *William* is good, and shall vest immediately.

But that was DENIED BY THE COURT, for the contrary was settled in the *Duchess of Hamilton's Case* (a), viz. that though the first limitation is to a *papist*, who is disabled by the statute to take,

(a) 2. Eq. Abr. 624.

Trinity Term, 9. Geo. 1. In Chancery.

CARRICK
AND OTHERS
against
ERRINGTON.

yet it is not such a void limitation, so as the remainder shall immediately vest, as if the first was dead without issue.

Besides, this estate is more likely to continue in a protestant family by supporting this conveyance than by destroying it; for *Thomas Errington*, the papist, is an old man, and has no issue, but *William*, who is the next in remainder, is a protestant.

THE COUNSEL for the plaintiff argued, that it was proper for him to apply to this court, because it was to discover a fraud, and for that the legal estate was and is in trustees; so he must come into a court of equity to set the deed aside. And if it is set aside, the plaintiffs must take as heirs at law to *Edward*; for though two of them are papists, yet they were above the age of *eighteen years* at the time this statute was made, and consequently not subject to the penalties therein mentioned. But admitting they were all papists, and incapable to take, yet certainly they are capable of coming into a court of equity to set aside any conveyance fraudulently obtained from their ancestor; and the rather, because it may happen that the next of kin, who is a protestant, may not be willing to be at the expence of a suit in chancery for such a precarious interest as to receive the profits of an estate until the heir at law becomes a protestant; so that a fraudulent deed shall carry the estate. Besides, it was settled in the case of *Roper v. Radcliff (a)*, that the heir at law, though a papist, is capable to take the inheritance, for it is in him, though the next protestant of kin has the pernancy of the profits until the other becomes a protestant; and the trust limited to support contingent remainders cannot be said to be a trust for a papist, nor shall the remainder-man in this case take immediately, supposing the limitation to *Thomas* to be void as to himself, because he * was a papist; for if he should take immediately, then this absurdity would follow, viz. all the contingent remainders to the sons of *Thomas* would be void; and it could never be the intent of the donor, that *William* the remainder-man, who gave no consideration, should immediately have the estate; for all the consideration moved from *Thomas*, and the only consideration mentioned in the deed is money, so no other shall be averred.

* [35]

There was no decree made, but a reference to A MASTER to enquire what was the consideration of this deed, if any.

And as for what was offered, that two of the plaintiffs were *eighteen years old* at the time of making the statute, and consequently out of the penalty, THE COURT WAS OF OPINION, that they were out of the letter of the act, but within the intent and meaning of it; for the lawmakers could never intend to put infants of tender years in a worse condition than those who were of

(a) Post. 167. 181. 10. Mod. 23. 2. Eq. Abr. 508. 1. Brown P. C. 450.

Trinity Term, 9. Geo. 1. In Chancery.

age (a). But be that as it will, the plaintiffs are proper to make application here as heirs at law to *Edward Errington* (b).

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AND OTHERS
against
ERRINGTON.

(a) See the case of *Hill v. Filkin*, post. 154. 2. Peer. Wms. 6. 10. Mod. 481. 536.

(b) The cause came on to be heard, on the master's report, before KINO, Lord Chancellor, on the 17th of June 1726, who declared, that the deed of settlement ought to be taken to have been fraudulently obtained, according as was declared by an order made by LORD MACCLESFIELD on 16th June 1724, and did therefore DECREE, that the said settlement should be delivered up to the plaintiffs to be cancelled; and it was referred to the master to take an account of the profits of the estate in question received by *Thomas Errington* since the death of *Edward Errington*, discounting thereout what was due to him for principal and interest on the three bonds, and the bonds to be delivered up; and the surplus of the profits was to be divided into four parts, and the coheirs of *Edward Errington* were each of them to have one fourth part; and the receiver of the estate was to account before the master, and pay the money into his hands in like manner, and deliver possession of the estate to the said coheirs, and the tenants were to attorn and pay their rents accordingly. But on the 12th November 1726, the cause was

reheard, and both the above orders of 16th June 1724 and 17th June 1726 were reversed, THE LORD CHANCELLOR declaring, that he saw no cause to set aside the settlement made by *Edward Errington*, but that *Thomas Errington*, to whom a trust for life was limited for his benefit, being a person professing the popish religion, the trust was void by the statute 11. & 12. Will. 3. c. 4. and that during his life the plaintiffs and the defendant *Frances Errington*, the coheirs of *Edward Errington*, were intitled to the rents and profits of the estate from the death of *Edward Errington*; and therefore referred it to the master to take an account of the profits of the estate received by *Thomas Errington* since the death of *Edward*; and what the master should certify to be remaining in his hands, after all just allowances, was to be paid by him to the coheirs of *Edward Errington*, viz. to each a fourth part thereof; and the receiver was also to account and pay the rents in his hands in like manner; and he was likewise to deliver possession of the estate to the said coheirs; and the tenants were to attorn and pay their rents to them. And on an appeal to the house of lords, the decree was affirmed.

Savage against Foster.

Case 18.

MARGARET SMITH being seised of the lands in question, upon her marriage with *Peter Flavill* settled the same upon trustees and their heirs, to the use of the said *Peter Flavill* for life, then upon *Margaret* his intended wife for life; remainder, after the death of the said *Peter* and *Margaret*, to the heirs of the said *Peter*, on the body of the said *Margaret* to be begotten; remainder to the right heirs of the said *Margaret* for ever. The said *Peter* and *Margaret* had issue only one daughter, the now defendant, who was married to one *Foster*.—*Peter Flavill* died, and then his widow married one *Brown*, by whom she had issue one other daughter, and no more; which daughter being courted by one *Williams*, but he refusing to marry her without such a fortune, which *Margaret* her mother was not able to give without breaking through this settlement, conveyed the said lands to the aforesaid *Williams*, &c.; and the defendant *Mrs. Foster*, and her husband, who knew that the lands were settled on her in tail as aforesaid, solicited her mother *Margaret Brown* to make a conveyance in favour of the said *Williams*, and were assisting in carrying on the

Where a person knowing his own title, and not giving notice of it to a purchaser, shall never set it up against the purchaser.

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against
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marriage between him and her half-sister *Brown*. * Whereupon the said *Margaret* conveyed these lands, &c. to the use of herself for life, remainder to *Williams* and his heirs; then the marriage took effect; and afterwards *Williams* sold these lands to the plaintiff *Savage*, who entered and built an house thereon.

And now *Mrs. Foster*, who was the issue in tail by virtue of the said settlement, and endeavouring to set it up against the title of the plaintiff, who was the purchaser, he exhibited a bill against her to have his title established against that settlement; for that she having full notice of the purchase, and of her own title, she gave no notice thereof to the plaintiff, and therefore ought not to be at liberty now to impeach it, though she was a *feme covert*, but that she should be concluded by this fact as well as if she was an infant.

IT WAS ARGUED for the defendant *Mrs. Foster*, that two things are necessary to bind the right in cases of this nature: the one is, that the party must know his own title to the lands; and the other is, that he must be instrumental in promoting the purchase thereof by the vendee, without giving him notice of such title; for it would be of dangerous consequence if the bare permission of him to proceed in the purchase should be a foundation to bind his right in this court on the foot of fraud. It is true, the defendant knew she had a title under this settlement, but she apprehended she was not to take till after her mother's death; she knew likewise that her sister was about to marry with *Williams*, but did not know upon what terms; but if she had known the terms of that marriage, she was then a *feme covert*, and her husband ought to have given the plaintiff notice of her title; therefore his negligence shall not prejudice her, who had done nothing to lose her inheritance and the entire benefit of this settlement for ever.

ON THE OTHER SIDE it was first denied, that the two things before-mentioned by the plaintiff's Counsel are necessary to have relief in cases of this nature; the one, that the party should know his own title; and the other, that he should be instrumental in carrying on the purchase by another, without giving him notice of such title. It is true, he ought to know his own title, and that must necessarily be intended in this case, because the defendant had the custody of this deed of settlement; but it is not necessary that the person interested should be active or instrumental in carrying on the agreement in order to a purchase; for * if the party knew his own title, there can be no danger that his right should be bound by the purchase, because it was in his power to help himself, by giving the purchaser notice of such right; and though this defendant was a *feme covert*, yet it was a fraud in her not to give the purchaser notice of her right; and therefore it shall be bound for ever; and the rather, because the defendant solicited her mother to make this conveyance in favour of *Williams*, upon the marriage of her sister, and for that the plaintiff hath entered and built on the lands.

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THE COURT: Where there is a parol agreement made for a lease, and the lessee, by virtue of such agreement, enters and builds, this Court will establish it on the foot of fraud in the lessor, notwithstanding the statute of Frauds, &c.; because contracts executed in part are not always within the statute, though executory contracts are (a).

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against
FOSTER.

Now this bill is brought to be relieved against a fraud in the defendant, who would avoid the plaintiff's title by an elder settlement, though she was privy to, and assisting in, carrying on the marriage of him under whom the plaintiff claims, and never gave any notice of her title to the purchaser. 2. Com. Dig. "Chancery" (4. I. 3).

Now when anything in order to a purchase is publicly transacted, and a third person knowing thereof, and of his own right to the lands intended to be purchased, and doth not give the purchaser notice of such right, he shall never afterwards be admitted to set up such right to avoid the purchase; for it was an apparent fraud in him not to give notice of his title to the intended purchaser (b), and in such case infancy or coverture shall be no excuse; for though the law prescribes formal conveyances and assurances for the sales and contracts of infants and *feme coverts*, which every person who contracts with them is presumed to know; and if they do not take such conveyances as are necessary, they are to be blamed for their own carelessness, when they act with their eyes open; yet when their right is secret, and not known to the purchaser, but to themselves, or to such others who will not give the purchaser notice of such right, so that there is no laches in him, this Court will relieve against that right, if the person interested will not give the purchaser notice of it, knowing he is about to make the purchase; neither is it necessary, that such *infant* or *feme covert* should be active in promoting the purchase, if it appears, that they were so privy to it that it could not be done without their knowledge. 2. Com. Dig. "Chancery" (4. W. 28.).

* THEREFORE IT WAS DECREED, that the defendant should levy a fine to the plaintiff to extinguish her right to the lands in this settlement, and that the plaintiff should have a perpetual injunction to quiet his possession; and that if the defendant shall levy the fine quietly, and without delay, then the plaintiff shall have no costs, otherwise he shall pay costs. And the case of *Watts v. Cresswell* (c) was now remembered, where tenant for life borrowed money, and his son, who was the next in remainder, and an

* [38.]

(a) See *Pyke v. Williams*, 2. Vern. 455. *Lockey v. Lockey*, Prec. Chan. 519. *Floyd v. Buckland*, 2. Freem. 268. *Gunter v. Halsey*, Amb. 586. *Earl of Aylesford's Case*, 2. Stra. 783. *Owen v. Davis*, 1. Vezey, 82. *Taylor v. Beech*, 1. Vezey, 297. *Potter v. Potter*, 1. Vezey, 441. *Lacon v. Mertins*, 3. Atkins, 4. *Whitebread v. Brockhurst*, 1. Bro. Ch. Rep. 404. *Whitchurch v. Bevis*, 2. Bro. Ch. Rep. 566. *Reading v. Wilkes*, 3. Bro. Ch. Rep. 400.

(b) See *Mocatta v. Murgatroyd*, 1. Peer. Wms. 393. *Goodtitle v. Morgan*, 1. Term Rep. 762. *Towle v. Rand*, 2. Brown's C. C. 650.

(c) 9. Viner Abr. 415.

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against
FOSTER.

infant, was a witness to the deed of mortgage; this Court gave relief on the foot of fraud, because the infant did not give the mortgagee notice of his title. So in the case of one *Clerc* (a), who was an infant, and clerk to an attorney, and had a mortgage on his master's estate, and engrossed a subsequent mortgage thereof to another, without giving notice that the estate was mortgaged before to him; and for that reason his mortgage was postponed on the foot of fraud (b).

NOTA, In the next sessions of parliament, the defendant petitioned to appeal, or to have a rehearing at the peril of costs, and offered to levy a fine on that condition; but it was rejected for not coming in time.

(a) *Clerc v. Earl of Bedford*, 13. Viner Abr 536.

(b) That an infant who is privy to or practises a fraud shall be bound in the same manner as if he had been adult, see *Evroy v. Nicholas*, 2. Eq. Abr. 489.

Becket v. Cordley, 1. Brown's C. C. 353. *Harvey v. Astley*, 3. Atk. 607.; but it seems, that this rule is confined to such acts as are voidable only, *Sanderfon v. Marr*, 1. H. Bl. Rep. 75.

Case 19.

Dowse against Rue.

The subsequent mortgagee prays to redeem the first mortgage upon payment of what was due; and pending that suit, the first mortgagee sets up another mortgage prior to them all: DECREE a trial at law, whether that mortgage was executed; and if it was, how much money was paid on it.

UPON AN APPEAL from a decree at THE ROLLS, the case was thus:

The defendant, *Mrs. Rue*, whilst a *feme sole* lent a hundred pounds to the mortgagor, who, for securing the repayment thereof, made a mortgage of the lands to her, dated in April 1700.

Afterwards the defendant married *Mr. Rue*, who being a sea-faring man, and having a pension or half-pay from the Government, proceeded in a voyage to serve the *Czar of Muscovy*, and left a letter of attorney with his wife to receive his pay as it should become due.

Afterwards the mortgagor of these lands borrowed six hundred pounds more of one *Mary Sherlock*, and for securing the repayment thereof with interest, he mortgaged the said lands to her by deed, dated in August 1701, which was a year after the mortgage for the one hundred pounds to the defendant *Rue*, who assigned the said mortgage of a hundred pounds to another in her husband's absence, pretending she had a power so to do, and produced a letter of attorney (as she pretended) under his hand for that purpose; * but as soon as he returned, he brought a bill in equity against the assignee, and had a decree for a reconveyance on payment of one hundred and fifty pounds, which was paid by the said assignee to the wife, upon her assignment of the said mortgage.

Then the plaintiff *Dowse*, in right of his mother-in-law, *Mary Sherlock*, who had the subsequent mortgage for six hundred pounds, exhibited this bill against the defendant *Rue*, and the assignee, to have a fair account, and to have an assignment of the prior mortgage of one hundred pounds upon payment of what shall appear to be

* [39]

S. C. 2. Eq. Ab. 613.

2. Peer. Wms. 491.

2. Vern. 29. Si. 151.

2. Vezey, 571.

3. Com. Dig.

"Chancery"

(4. W. 28.).

Trinity Term, 9. Geo. 1. In Chancery.

be due thereon (a) ; and the rather, because the said first mortgagee had all the deeds and title of those lands which were left in her possession by the mortgagor ; so that the plaintiff, who was the subsequent mortgagee, might be easily deceived.

Downs
against
Rtz.

But now pending this bill, the defendant set up another mortgage of those lands to them for securing the payment of two hundred pounds with interest, which mortgage was dated the twenty-eighth of *March* 1700, about three weeks before the mortgage in *April* for one hundred pounds ; but it being denied by the plaintiff, there was a decree made at THE ROLLS, that it should be tried at law, whether the deed dated the twenty-eighth of *March* 1700 was executed, from which decree the plaintiff now appeals, for that it was too short ; for if upon the trial it should appear that such deed was executed, yet the money therein mentioned might be paid in part or in the whole ; therefore it should be directed to be tried in like manner, whether that money, or how much thereof, was paid.

BUT IT WAS INSISTED for the plaintiff, that this mortgage of two hundred pounds should be set aside without a trial at law, because it appeared that the mortgagor had a title to those lands by lease for thirty-four years ; and in the mortgage dated in *March*, he recites it to be for thirty-eight years, so that it is very unlikely he would mortgage it for four years longer than he had in it ; and in *April* following he mortgaged it to the same person for thirty years, to commence immediately ; and this was very extraordinary in the mortgagee to take a second mortgage of the same lands for a shorter date and time than the first, when the money lent and secured by this second deed might have been better secured by indorsing it on the mortgage dated in *March* before. Besides, if a subsequent term of the same premises was taken in *April*, and to commence at the same time, that will be a surrender in point of law of this deed in *March* before.

* It was admitted at THE ROLLS, at the hearing this cause, that if the deed in *April* had been to secure a greater sum of money than the deed in *March*, it might have been presumed to have been made in satisfaction of the first sum ; but it may be as well presumed, that the mortgagor paid a hundred pounds of the two hundred pounds, and gave the second mortgage in *April*, for the securing the payment of the other hundred pounds, and neglected to cancel that in *March*.

* [40]

Besides, the defendant was never in possession by virtue of this mortgage dated in *March*, neither was the principal or any interest demanded in twenty years.

(a) See *Wortley v. Birkhead*, 2. Vern. 81. *Belchier v. Renford*, 2. Vezey, 571. *Hawkins v. Taylor*, 6. Brown P. C. 28. *Robinson v. Davidson*, 1. Brown C. C. 63.

BUT

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Dowse
against
Rev.

BUT IT WAS INSISTED *for the defendant*, that no alteration ought to be made in the decree at THE ROLLS, but only, that it may be directed to try if any part, and how much of this two hundred pounds was paid :

AND THEREUPON IT WAS DECREED, that it should be tried at law, whether this deed was executed; and if it was, then whether the whole, or any part, or how much of the money was paid.

Case 20.

Reynolds *against* The Lady Tenham.

Guardianship of
an infant is not
assignable to an-
other.

S. C. 2. Eq. Abr.
486.

2. Eq. Cal. 486.
pl. 16.

THIS WAS A PETITION preferred to THE LORD CHANCELLOR by *Mr. Reynolds*, the grandfather of an infant of the age of seven years, to have him taken out of the custody of his mother, the defendant, being A PAPIST, and to be delivered to *Serjeant Banes*, and another named by the petitioner, that he might be educated in the protestant religion.

It appeared by several affidavits ready to be produced, that this infant was entitled to seventeen hundred pounds a-year, as tenant in tail in remainder, after the determination of the estate for life of his said grandfather.

IT WAS INSISTED *for the petitioner*, that it might be of very ill consequence that the education of this child should be left with a papist, who might insfil the principles of that religion in an infant. That the father of this infant said on his death-bed, that he expected his father, the petitioner, would take care to educate this child in the protestant religion, and not leave the education of it to his wife, who was a papist; but he being now dead, and the grandfather, the petitioner, very old, and for that reason unable to take the guardianship on him; he desired that two of his friends in whom he reposed an entire confidence, and to whom he assigned the guardianship, might have the education of this infant.

* [41]

* Thereupon THE COURT inquired, whether those persons were willing to take this charge upon themselves; and one of them, *viz. Serjeant Banes*, being present, said, that he had received several favours from *Mr. Reynolds*, the petitioner, and therefore was willing to serve him in anything with which he should be entrusted; and that if the Court thought it proper, he would take this charge upon himself.

But the defendant, the *Lady Tenham*, did by her Counsel oppose the making any order upon this petition, for that it appeared by the oath of the *Earl of Litchfield*, then in court (who was the godfather of this infant), and by the oaths of several other persons, that this lady had so great a regard to what her husband in his lifetime desired, as to the education of this child, that she directed he should be baptized by a minister of the church of *England*, and that

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that he is constantly attended by such a minister, ever since he hath been capable of any instruction, and particularly he hath been taught the church catechism. Besides, the petitioner deserves very little favour as to this matter, because he having seventeen hundred pounds a-year as aforesaid, was so hard to his own son (the father of this infant) that he allowed him no more than forty pounds a-year for his maintenance, and would never see him since his marriage with the defendant, and had never seen this infant, his grandchild, or desired to see it; therefore it would be very hard to take a child from a mother, at the instance of a grandfather, who was so very unkind to his own son, and to commit it to the care of strangers (for he doth not desire the guardianship himself); and the rather, because the mother is willing to give any security the Court shall approve, that this child shall be educated in the protestant religion, and that the *Earl of Litchfield* would be one of her securities; or otherwise, that this child might be delivered to that noble lord, or at least that he may be one of the guardians, and that she may have the liberty of seeing her own child, and not be deprived of that comfort which all other mothers naturally enjoy.

REYNOLDS
against
THE LADY
TENHAM.

THE COURT. This lady has been married to two protestants, and still continues a Roman Catholic, and probably it is to her honour so to do, being convinced she is in the right; but though her honour has got so far the better of her principles, as to educate this child a protestant, according to the desire of her husband, yet it is to be feared, that she will always have such persons about her as may instil the principles of another * religion in his mind, and make a wrong impression on his tender years. Besides, if this was not to be feared, it might be more advantageous for the child to be under the care of some other persons, and not of his mother, who by her indulgence and fondness might do it an injury.

* [42]

THEREFORE IT WAS ORDERED, that the child should be delivered to those persons whom the grandfather, the petitioner, had appointed to be guardians, but so as the mother may see him at any time.

BUT THIS DECREE WAS REVERSED in the house of lords, upon the appeal of the *Lady Tenham*, and there resolved, that these words of her husband on his death-bed, "that he expected his father, the petitioner, would take care to see this child educated in the protestant religion," were a good appointment to make the grandfather guardian. That the appointment of a guardian is a bare power and trust, and not assignable, as it has been resolved in the case of *Bedle v. Constable* (a); and about three years since in the *Duke of Beaufort's Case* (b), whose father had appointed the *Duke of Ormond* guardian; but he being attainted of high treason, and so made incapable, another guardian was ap-

(a) Vaugh. 177.

(b) 1. Peer. Wms. 703.

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pointed by act of parliament, it being not to be done by any other power.

THEREFORE the petitioner, the grandfather, was ordered to take the guardianship upon himself in person, for that he could not assign his power to another; and this is agreeable to another decree made in the house of lords, in the case of *Foster v. Denyon* (a).

(a) 2. Chan. Rep. 237. See also and Mr. Fontblanque's Equity, 2 vol. Roach v. Garvan, 1: Vezey, 160; 235. Harg. Co. Lit. 88. note.

• [43]

Case 21.

Steed against Cragh.

At the Rolls.

A long term of years was vested in the husband in right of his wife; he made an under-lease for ten years; and upon borrowing money of the lessee, covenanted to grant him another lease after the end of the ten years, and to continue during the time he had any right; but died before he made such lease: DECREED that this was a good disposition of the term in equity.

S. C. 2. Eq. Ab. 37.

THE DEFENDANT being a *feme sole*, and possessed of a long term for years, afterwards married with *W. R.* who made an under-lease to *L. R.* for ten years; and in some short time after, having occasion for money, he borrowed it of the said *L. R.* the under-lessee, and covenanted that he would grant him another lease of the premises, to commence after the expiration of the said term for ten years, and to continue during the time he had any right, &c. but died before he made such lease. * *L. R.* the under-lessee, assigned his term of ten years to *B. B.* and also all his right which he had by virtue of this covenant, and then *B. B.* by his last will devised the same to the plaintiff *Steed*, who entered, and was possessed, and the term for ten years being expired, the now defendant (who was plaintiff at law) brought an ejectment; and thereupon the plaintiff exhibited a bill to be continued in the possession of the lands, by virtue of the said covenant, and that the Court might declare he had a right under it, and grant an injunction to stay proceedings at law.

The defendant demurred to the bill, suggesting, that if there was any such covenant, it was only a bare agreement between the parties, and rested in covenant, which could only charge the executors or administrators of the covenantor; and that she claims neither as executor or administrator, but by virtue of that right which she had paramount that of her husband (a); and therefore insisted that this bill might be dismissed with costs.

BUT THE COUNSEL for the plaintiff argued, that this covenant was a good disposition of this term in equity, and that it was not prayed in the bill, that the defendant should be obliged to carry this covenant into execution, but that the Court would declare it to be a good disposition of the term in equity; and thereupon to grant an injunction against the defendant.

(a) 32. Hen. 8. c. 28. Co. Lit. 326. 261. 2. Com. Dig. "Baron and Feme" 351. 1 Roll. Abr. 343. 852. Hob. (E. 2.) (R.).

AND

Trinity Term, 9. Geo. 1. In Chancery.

AND ACCORDINGLY IT WAS DECREED at the Rolls, that this covenant was a good disposition of the said term in equity, because the husband had a power to dispose it; and that the covenant was such a lien as bound the right, in whose hands soever it went (a).

STEEB
against
CRAGG.

(a) Grute v. Locrest, Cro. Eliz. 237. 2. Jones, 88. 2. Lev. 189. Oglander v. Barton, Moor, 395. Anonymus, Poph. 4. Norden v. Lovett, 69. 1. Freem. 442. 1. Eq. Abr. 240.

Anonymous,

Case 22.

A FEME SOLE being possessed of a term for years, married W. R. who was afterwards divorced à mensâ et thoro, and she had alimony allowed to support her.

The husband possessed of a term in right of his wife, was divorced à mensâ et thoro, and an injunction was granted, he being about to sell this term.

And now the husband intending to sell this term, her Counsel moved for an injunction.

Which THE COURT denied at first to grant (a), because the separation à mensâ et thoro did not destroy the marriage, for the parties were still husband and wife: now supposing the husband had been entitled to this term in his own right before marriage, and afterwards had been divorced from his wife, and she had alimony allowed, this Court would never * have granted an injunction to hinder him from selling; and certainly, whilst the marriage continues, he has the same power to dispose the term (b), which he has in right of his wife, as he had if it had been in his own right.

* [44]

But her Counsel still pressing for an injunction, so that the merits of the cause might come before the Court, and insisting very much on the hardship of the case, and that the wife could have no remedy if this term was sold;

THE COURT granted an injunction; for though the marriage continues notwithstanding the divorce, yet the husband does nothing as husband, nor the wife as wife.

(a) See Milner v. Colmer, 2. Peer. Wms. 641. Fitzer v. Fitzer, 2. Atk. 514. Dimmock v. Atkinson, 3. Brown's C. C. 395.

(b) Co. Lit. 46. 351. Hob. 3. in marg. 1. Vent. 7. 18. 2. Cases in Ch. 73. 2. Vern. 270. 3. Atk. 435. 3. Will. 277.

TRINITY

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TRINITY VACATION,

The Ninth of George the First,

IN

The Year

1723,

BEFORE

The Barons of the Exchequer,

AT

Serjeants Inn Hall.

Sir James Montague, Knt. Chief Baron.

Robert Price, Esq.

Sir Francis Page, Knt.

Sir Jeffrey Gilbert, Knt.

} *Barons.*

The Executors of Devallar *against* Herring.

Case 23.

ONE *Smith*, who was proprietor of an annuity ticket in one of the public funds, sold it to *White*, who sold it to *Devallar*, a single man, who made the plaintiffs his executors, and died.

The plaintiffs coming to his house after his death, found one of his scrutores opened, which they suspected to be done by one *Powell* his man-servant, by the contrivance of the servant-maid; they being the only persons in the house, and are since inter-married.

Upon examining the books of account, the plaintiffs found an entry made of an annuity ticket bought of *White* on such a day, which

TROVER will not lie against the bona fide holder of an annuity ticket which had been lost by or stolen from a former proprietor, if such ticket has been regularly transferred to such holder pursuant to the statute by which it was issued.

Trinity Vacation, 9. Geo. 1. At Serjeants Inn Hall.

THE
EXECUTORS
OF
DEVALLAR
against
HERRING.

which was a little before his death; and that ticket being now lost, the plaintiffs advertised it in the public papers, with a promise of a reward to any person who should produce it, and to stop it before it passed the office. But this advertisement being not made till about two months after the testator's death, the ticket was sold before that time in *Exchange-Alley*, and passed through several hands until it came to the defendant *Herring*, who purchased it for a valuable consideration, and had it transferred at the office to himself as from *Smith*, the first proprietor, whose name was endorsed; and a blank space left over it to fill up the indorsement as usual; all which was done before the advertisement.

* [45]

* The plaintiffs (the executors), knowing this ticket to be in the possession of the defendant *Herring*, brought an action of *trover* against him.

At the trial they were nonsuited, because the defendant having a transfer from *Smith*, the first proprietor, and counter-signed in the office, he had thereby a propriety, and no other person could have a legal right to it (a); for the statute 11. & 12. Ann. c. 9. by which these annuity tickets were created, or the fund for the same, expressly provides, "that every transfer of these tickets shall be filled up and counter-signed at the office, and an entry kept of every assignment, or transfer, with the names of the parties contracting for the same."

Evidence.

And it being a question at this trial, Whether any evidence ought to be admitted of the right to this ticket, claimed by any person who had not complied with this statute, against the right of him who had complied?

IT WAS RULED BY THE COURT, that it ought not; and thereupon the plaintiffs were nonsuited.

If a statute on which annuity tickets are issued, direct "that every transfer of such tickets shall be filled up and counter-signed at the Bank," a purchaser of such ticket, who neglects to comply with such direction, cannot, on his losing such ticket, be relieved in *equity* against a *bona fide* holder of it, who has complied with the directions of the act.

Afterwards the executors exhibited a bill in THE EXCHEQUER, in which they set forth the death of the testator, the entry of this ticket in his books, and all the aforesaid matter, and that such tickets are constantly sold in EXCHANGE-ALLEY without indorsing any transfer, but only the name of the first proprietor; and that such which have not transfers indorsed, sell better than those which have many such indorsements; and that it is the common practice never to make any indorsement over the first proprietor's a purchaser of such ticket, who neglects to comply with such direction, cannot, on his losing such ticket, be relieved in *equity* against a *bona fide* holder of it, who has complied with the directions of the act.

(a) See the case of *Power v. Wells*, Cowp. 819. that in order to support an action of *trover*, property in the plaintiff is essentially necessary; and therefore where the plaintiff exchanged a house with the defendant and gave possession of it, it was held that *TROVER* would not lie to recover it back again, although the exchange was unfair; for by the ex-

change the property was gone out of the plaintiff. See also *Colston v. Woolston*, Bull. N. P. 35. *Ekins v. Smith*, Raym. 356. *Whitehall v. Squire*, 3. Mod. 276. *Miller v. Race*, 1 Burr. 452. *Anonymous*, 1. Salk. 426. *Grant v. Vaughan*, 3. Burr. 1516. *Peacock v. Rhodes*, Dougl. 613.

name

Trinity Vacation, 9. Geo. 1. At Serjeants Inn Hall.

name whilst these tickets are in agitation, nor until they come into the hands of such persons who intend to keep them; for if every transfer should be indorsed, the tickets would be so full of them, that they could be no longer transferable.

THE
EXECUTORS
OF
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Therefore it was insisted, that the not indorsing the transfer, should not, in equity, prejudice the plaintiffs, it being the constant method of assigning such tickets, not to indorse the transfer as aforesaid.

The defendant by his Counsel insisted, that he purchased this ticket at a market-rate, and *bona fide* for a valuable consideration in *Exchange-alley*, without any covin or fraud; and that he had complied with the statute (a), and filled up an indorsement, which was proved by one *Mackoy* a broker, of whom he bought this ticket; and therefore it was insisted, that this bill might be dismissed with costs, as having no equity against the defendant, and for that the plaintiffs had already been defeated at law.

* IT BEING OBJECTED against reading the depositions of *Mackoy*, for though he is a broker, and as such might be a witness; yet it appears by his own deposition, that in this case he did not act as a broker, but sold the ticket in his own right; and because the defendant may have some demand against him, if the plaintiffs should prevail in this suit, therefore he ought not to be an evidence for the defendant, for that in consequence might be to discharge himself.

* [46]

If *A.* purchase an annuity ticket and lose it, and *B.* being employed as a broker in *Exchange-alley*, sells it to *C.* on a bill in equity being brought by *A.* against *C.* the deposition of *D.* may be read in evidence.

BUT THE COURT was of opinion, that his depositions should be read; for though his evidence might not be admitted before a jury of freeholders, for the reason before-mentioned; yet this Court are proper judges what stress or weight ought to be laid on it.

And after reading the answer, and *Mackoy's* evidence confirming it in every thing,

THE CHIEF BARON and *Baron GILBERT* were of opinion, that the bill ought to be dismissed; for that every purchaser of such tickets who keeps them open after the purchase, without filling them up with an indorsement and transfer according to the statute, keeps them at his own risque or peril; and if they come afterwards into the hands of a stranger *bona fide*, and for a valuable consideration, who gets a transfer indorsed as directed by the statute, he hath an absolute right to them, both in law and in equity.

And *Baron GILBERT* held, that whatever the Court might do, if the cause was open, and came before them without a trial at law; yet there could be no equity now to set aside the *non suit*,

(a) *Cook v. Bamfield*, 1. Chan. Cases, 228. *Blades v. Blades*, 1. Eq. Cases Abr. 358.

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because that would be an admittance that the defendant had a legal right.

THE CHIEF BARON was likewise for dismissing the bill. It is true, if the testator *Devallar*, when he purchased this ticket, had procured a transfer to himself, and thereby had a legal right to it; in such case, if after his death the defendant had purchased it of a stranger, without acquainting his executors (the plaintiffs) therewith, they might have some equity on their side, because the name of their testator was indorsed on the ticket, and by that means the defendant might have been sure who was the owner of it, and who had the power to transfer it to him; yet as this case is, there could be no negligence in the purchaser, for he bought it for a valuable consideration, and had done every thing necessary to establish his right, and could not know that the plaintiff's testator had any right to this ticket, because there was no transfer indorsed to *him; therefore by keeping it open without any transfer, he kept it at his own risque for any man to fill up, who came to the possession honestly, and without fraud; so that this bill ought to be dismissed.

• [47]

Baron PRICE differed in opinion, and argued from the hardship of the case; and that the defendant should have taken care when he bought this ticket of whom he bought it, especially since *Mackoy*, the seller, had no transfer to himself, but only the bare possession; and since the name of *Smith*, the first proprietor, was indorsed, he might have been informed whose ticket it was he then bought. That it was a hard case on both sides; it was hard for the plaintiffs (the executors) that they should lose their right, because they did not know it soon enough to advertise it; and it is hard for the defendant to lose the benefit of his purchase. He put the case of a *promissory note*, which, if indorsed and afterwards lost, and passed in way of trade to a third person, for a valuable consideration; yet the indorsee might bring an action of TROVER for the note against the third person; which THE OTHER BARONS did not deny (a).

Thereupon it was proposed by *Baron PRICE*, that this ticket should be divided between the contending parties, but that was not agreed to;

And at last THE COURT took time farther to consider until next *Michaelmas Term*.

(a) But see *Hinton's Case*, 2. Show. Grant v. Vaughan, 1. Black. Rep. 485. 235. Miller v. Race, 1. Burr. 452. Peacock v. Rhodes, Dougl. 613.

TRINITY VACATION,

The Ninth of George the First,

I N

The Year

1722,

BEFORE

Sir Philip Yorke, Knt. Attorney General.

Sir Clement Wearg, Knt. Solicitor General.

Vernon against Benson.

Case 24.

THIS was a case referred to THE ATTORNEY and SOLICITOR GENERAL by the king and council for their advice, whether it was reasonable for the king to revoke a *sign manual* and *privy signet* granted to *Sir John Fryar*, in trust for the defendant *Benson*, the same being obtained by surprise (as was suggested in the plaintiff's petition) and without a full and due information.

A SIGN MANUAL not counter-
signed by the
lords of the trea-
sury, nor by a
secretary of state,
is not good.

The case was thus:

Colonel Vernon, father of the petitioner *Mary Vernon*, and great uncle of the other petitioner *Captain Vernon*, was a true royalist in the civil wars, and sold his estate to raise a regiment for the service of the king, and afterwards served him in his exile. After the king was restored, he granted to the said *Colonel Vernon* certain lands in *Cloontarfe* in *Ireland*, now of the value of seven hundred pounds *per annum*; and likewise, in consideration of his said services to the crown, and of his giving the king all * that land on which the fort of *Sheerness* then stood, and also of seven thousand pounds in money, the king by letters patent granted to him, and to *Rupert Brown*, the honour, manor, and forest of *Weedwood* in fee. Before this grant made to *Colonel Vernon*, he was possessed of some of the offices in the said forest for a long term of years

* [48]

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against
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then to come, by virtue of a grant made thereof to the *Duke of Ormond* and *Earl of Chesterfield*, in trust for him, &c. But the grant of this forest, as aforesaid, being apprehended by some persons at court to be very excessive, there was some intention to revoke it; but it not being done in the life-time of that king, his brother and successor, *James the Second*, having the like intention, a bill was exhibited against the said *Colonel Vernon* and *Rupert Brown*; and upon a full hearing of the cause before *JEFFERIES*, *Lord Chancellor*, assisted by the TWO CHIEF JUSTICES and CHIEF BARON, it was decreed, that the said letters patent should be vacated, being obtained by a gross imposition on the king in the value of this forest, which are the very words of the decree. *Colonel Vernon* intending to appeal to the house of lords from this decree, soon afterwards died; and upon the accession of *King William* to the crown, it was thought not expedient to rest his right to this forest on this decree; therefore an act of parliament passed to vest this forest, and all the rights and members thereof in the crown, nobody appearing in that sessions of parliament to claim any right the *Colonel* had therein, or to the leases he had in the said offices, or to the lands on which the *Fort of Sheerness* was built, the heirs and representatives of the said *Colonel* being all Roman Catholics. But *Rupert Brown* took care of himself, by obtaining in the said statute a saving of his right; and by a clause therein, viz. "That he should be paid what debt was due to him from "*Colonel Vernon*, by sale of some timber in the said forest, to be "set out by such persons as the king should appoint; and that he "should assign over such securities as he had from *Colonel Vernon*, "to such person or persons as the king by his sign manual or "privy seal should at any time appoint to recover the same." And *Rupert Brown* being paid the debt due to him by the sale of timber, this debt, which was originally due from *Colonel Vernon*, remained in the crown. * Thereupon the late queen granted A PRIVY SEAL to one of her officers to recover this debt for her use; and the petitioner *Mary Vernon* having in like manner petitioned her majesty as now, and that petition being referred to the lords of her majesty's council, they represented the petitioner to the queen as an object of her charity.

* [49]

But the *Queen* dying before anything more was done pursuant to the said privy seal; this debt due from *Colonel Vernon* still remained in the crown by virtue of the statute aforesaid; and thereupon the defendant *Benson* obtained this sign manual, to *Sir John Fryar*, to recover this debt in trust for the said *Benson*; and likewise another sign manual reciting the first, and commanding *Rupert Brown* to deliver to *Sir John Fryar* all the securities he had from *Colonel Vernon*, and to assign them to *Sir John*, which was accordingly done by an assignment of a judgment of three thousand five hundred pounds in *Ireland*, which affected his estate in *Cloontarfe*, which judgment was revived; and the petitioner *Mary Vernon* sued to an outlawry there, and a *scire facias* was brought against
Captain

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Captain Vernon, the other petitioner, who was the next in remainder after an estate-tail in the petitioner *Mary*, by virtue of a settlement made by *Colonel Vernon* (the said *Mary* being now above fifty years old, and without issue); thereupon this petition was exhibited, suggesting the matter above mentioned, and that the king was surprised in the granting this sign manual, and not duly informed of the merits and services of *Colonel Vernon*, or of that equitable demand he might have of the crown, for the land on which the fort of *Sheerness* was built, or of those terms for years still subsisting of, and in those offices which he had in *Weedwood Forest*.

Vernon
against
Benson.

And this petition being referred to THE ATTORNEY and SOLICITOR GENERAL for their opinion, whether it was reasonable for the king to revoke this sign manual and privy signet to *Sir John Fryar*, as obtained by surprise, and without due information, as aforesaid;

IT WAS ARGUED *in behalf of the petitioners*, that it was a great hardship that the heirs of *Colonel Vernon* should be deprived of those equitable demands they had on THE CROWN, for the lands on which the *Fort of Sheerness* was built, and of the right which they had to the leases for years in the offices in this forest, and to have no manner of satisfaction for the same, or for any part thereof; and that as it is very probable, if the king had been informed of these * demands at the time he granted this SIGN MANUAL, he would not have granted it, so it is reasonable for him to revoke it, now he is fully apprised of the said demands (a). Besides, this SIGN MANUAL never passed through the offices as it ought to have done, for there is no copy thereof in the office of the secretary of state, or in the office of the lords of the treasury, and therefore not duly issued; and it would be of dangerous consequence, if the treasure of the crown could be disposed by a sign manual, without being countersigned by the lords of the treasury, or some other officers, who are by the laws of the land to be a guard to the king, that he might not be imposed on by any of his subjects.

* [50]

THE COUNSEL *for the defendant* insisted, that this sign manual was obtained without any fraud, and without any imposition on the crown, and that this debt was now vested in the king by act of parliament, without any reservation of the right of the petitioners; and if they suffer any hardships, it is not by the defendant, but by the statute, who did not, nor could apprise the king of any right they had, as not knowing they had any; and that if they have any equitable demands on the crown, still they cannot have any right to this debt, because it is vested in the king by act of parliament, and therefore they may apply to him to be considered as his majesty shall think fit. Now, admitting the sign manual was not entered in the secretary's, or any other office, nor

(a) See 4. Inst. 88. 2. Roll. Abr. 191. 3. Lev. 241.

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VERNON
against
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counterigned by the lords of the treasury, or by a secretary of state; yet since it was fairly obtained, and since it was drawn by the under-secretary to the *Lord Sunderland*, who was principal secretary of state, and by him sent to *SIR EDWARD NORTHEY*, then *Attorney General*, for his opinion, and by him approved, and sent back to the secretary's office, and all this done before it was signed by the king; in such case, if the secretary hath been so remiss as not to enter a copy of it, his neglect shall not be prejudicial to the defendant, who had done all which he ought to do to obtain this sign manual. Besides, the not counterigning it doth not make it void, nor the not entering copies thereof in any of the said offices doth not make it ineffectual, because the counterigning or keeping copies thereof serves to no other purpose than to apprise the king, if any other person should endeavour to obtain a sign manual for the same thing which hath been already granted, or to serve as a tally to account with the king for his treasure; it adds no force to the sign manual; for in respect to the grantee, it is as good before it is counterigned as afterwards; for if it should be otherwise, then the secretaries of state and the lords of the treasury would have it in their power to render the king's grant ineffectual; therefore they are obliged to counterign the same. Besides, there is a very good reason why this sign manual should not be counterigned, because this demand never was any of the king's treasure; for it is only a power or right to bring so much money into the treasury; for which the lords of the treasury are not accountable till it is actually brought in; for which reasons it was insisted, that the king ought not to be advised to revoke this sign manual, though it was not counterigned, and though *THE ATTORNEY GENERAL* told the Counsel for the defendant, that he never saw any sign manual before this but what was counterigned.

[51]

THE COUNSEL for the petitioners replied, that it was absolutely necessary all signs manual should be counterigned either by the lords of the treasury, or by a secretary of state; otherwise great inconveniencies might happen both to the king and people; for the king might be abused into extravagant, nay, into different grants of the same thing to several persons; and it is for that reason the law appoints he should be guarded by such Counsel as would obstruct such grants; for if they should be good without passing through the usual offices, and without observing those usual ceremonies, it would be a vain thing to keep such offices as a fence to the crown from any impositions. And though it has been said on the other side, and it may be true, that the counterigning adds no strength to such grants, and that they are good in respect to the grantee, though not counterigned; and that it would be very inconvenient if the neglect of the king's officers should be prejudicial to the defendant; yet the counterigning is a necessary ceremony to be used in all the king's grants, to make them effectual in passing any interest to the grantee, and a condition without which

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which they cannot pass any treasure out of the crown. Now if countersigning is necessary, it would be a greater inconveniency to the public, if such grants should be good without being countersigned, than that the neglect of the officer should avoid a sign manual for not countersigning it, because it is the business of the grantee to see that the officer should do his duty in perfecting and finishing the grant; * but if such naked grants (as this) should be good to pass the king's treasure, then those offices and officers are of no use.

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against
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* [52]

On another day

THE COUNSEL for the defendant argued, that this was a good sign manual, and effectual to pass the king's right to this debt; for though it might not be good to pass the king's treasure, yet in this case it is no more than an appointment according to the statute to recover a debt, and doth not rest on the foot of other signs manual, but receives its strength from an act of parliament, by which the right to it is vested in the crown. This was granted by a sign manual of the late queen, and then, as now, the said *Mary Vernon* petitioned the queen to revoke it; and that petition was referred to the lords of the then council, who represented the petitioner as an object of her majesty's compassion, which in effect was giving up her right, and she may still be an object of compassion, but that cannot be a reason to revoke a sign manual fairly obtained; and to complain of any hardships, is to impeach the statute, which ought not to be done, because it is not to be imagined that the parliament would deprive any person of a just right without making some other recompence; and it may reasonably be presumed, that the petitioner had no right, for if she had, that had been the proper time to claim it before the act passed. But the truth is, she had no right; for the parliament considering how many years *Colonel Vernon* was in possession of this forest, and had received the profits thereof, might apprehend that to be a good consideration for his land on which the *Fort of Sheerness* was built, and of other demands he could have; and therefore there was no saving of any right in the statute as to him. Now as to the countersigning this sign manual, admitting it to be necessary; yet if other things were done, which amount to a countersigning, these shall make it as effectual as if it was countersigned: now this sign manual was sealed with the privy signet, which is always kept in the secretary's office, and this is a good proof that it passed through the usual offices, and was fairly obtained, and a better proof than if it had been countersigned by the secretary himself. Besides, about two years after the granting the first sign manual, the defendant obtained another, commanding *Rupert Brown* to deliver up *Colonel Vernon's* securities to *Sir John Fryar*, which last sign manual was countersigned by the * secretary of state; and a copy thereof is kept in his office, which plainly shews that it was not obtained by any surprize or misinformation.

* [53]

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• against
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THE COUNSEL for the petitioners argued, that though the first sign manual was recited in the second, yet that would not make the first good; for it was never yet heard that the recital of a void act in the king's grant should make it better; but on the contrary, if the second depends on the first, it avoids both, whether the grant is made by the king, or a subject. That this sign manual, being sealed by the privy seal, doth not amount to a countersigning, as was alledged on the other side; for the true reason of countersigning is not to shew that the grant passed through such an office, but to shew what was done by the minister of state, for or in behalf of the king, to whom he is accountable for his advice and conduct in the office. Now there being two secretaries of state, and a privy signet kept in each of their offices, the sealing the king's grants with the privy seal doth not inform the king, or the subject, which of those secretaries passed the grant, as countersigning doth; or if it did, it is not so effectual as countersigning is, to bring a public minister to account for his misconduct in passing such grants which ought not to be passed, because countersigning is an approbation of the grant, and an implied consent and advice of the minister to pass it. As to what was said, that this sign manual doth not rest on the foot of others, because it is but an appointment according to the statute to recover a debt; certainly this must be wrong; for though the statute impowers the king to assign this demand, it must be intended by a good and effectual sign manual, and not by one which is informal or void. And as to the representation of the late queen's council of the petitioner to be an object of her compassion, which is now said to be a giving up the right of the petitioners; it is very true, that since the statute the petitioners have no remedial right; neither do they insist in their petition, that they have any right, but set forth what services *Colonel Vernon* had done for the crown, and what reasons might induce his majesty to extend his royal bounty to them who are his heirs; and that this debt being now vested in the crown, they deserve to have it released more than any other person can deserve to have it granted. * It is true, the representation of these services, and the hardships suffered, are foreign to the merits of the reference now depending, but requisite to induce the king to grant this reference; therefore the petitioners did not now rely on those services, but would leave them to the consideration of the king in council: and at this reference they rely, that this is a naked and informal sign manual without any precedent, and not sufficient to pass the king's treasure, and consequently ought to be revoked, if it is his majesty's pleasure so to do.

* [54]

NOTA.

At this reference THE ATTORNEY GENERAL said, that he never saw any sign manual but what was countersigned by the secretary of state or the lords of the treasury, but had seen several not sealed with the signet or privy seal; that he had observed this difference, viz. that where the sign manual was only a direction or commission to do a farther act, as to make out letters patent, there it is only countersigned, but not sealed; but where it is

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to be the principal act itself, there it is both sealed and countersigned.

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BENSON.

Then one of THE COUNSEL for the petitioners said, that King William had granted a sign manual to the now defendant, who carried it to the secretary's office, when Mr. Vernon was secretary of state, in order to have it countersigned and sealed, which he refused to do, and would not return the sign manual, but kept it; and upon complaint made to the king, he was attended by that secretary, who shewed reasons for his so doing, and the king was satisfied with the suppressing it.

After the death of that king, a bill was exhibited in chancery by the now defendant against secretary Vernon, suggesting that he the complainant had obtained such A SIGN MANUAL, which would have been very beneficial to him; but that it was unjustly suppressed by the defendant secretary Vernon; and upon hearing the cause, that Court approved what the secretary had done, and the plaintiff's bill was dismissed.

THE REPORT of the Attorney and Solicitor General.—Upon consideration of the several matters laid before us, we humbly certify your lordships, that although grants or warrants under the king's SIGN MANUAL ought regularly to be countersigned by some officer of state, according to the nature and import of such grant or warrant; and that the omission of such countersigning may be some evidence of surprize upon THE CROWN, when there is nothing to account for it: yet we apprehend that suspicion is removed in the present case; the late Earl of Sunderland having by letter referred the consideration of this very point to his majesty's then attorney general, and the answer to that letter by Sir Edward Northey, in which he seems to intimate that there was no necessity that a warrant granted in pursuance of the proviso in the statute 7. & 8. Will. 3. (a) above mentioned, should be countersigned: which intimation of his, together with a doubt by what officer it ought to be countersigned, might probably occasion that omission. If the want of being countersigned makes the instrument void; or if THE CROWN had no authority to direct an assignment of the securities, because the three thousand three hundred pounds and interest was discharged by a fall of wood, and not paid in money; we conceive the petitioners may take advantage of these points in the ordinary course of justice (b).

As to what was insisted on for the petitioners, with regard to the circumstances of their case; and that his majesty would not have directed an assignment of the said securities to the person now claiming the benefit thereof, if those facts had been laid before his majesty; but if they were not, we do not think ourselves at liberty to judge whether his majesty would, or would not, have granted such warrant in case they had been represented to him; since we are of opinion he might, by law, have granted it, notwithstanding any of these matters insisted upon for the petitioners.

(a) See 7. & 8. Will. 3. c. 27. f. 15. (b) See 4. Inst. 79. 88. Dyer, 197. 3. Lev. 220.

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TRINITY VACATION,

The Ninth of George the First,

IN

The Year

1722,

BEFORE

The Delegates,

Sir Lyttleton Powys, Knt.

Tracy, Knt.

Sir John Fortescue Aland, Knt.

Sir James Montague, Knt.

Sir Francis Page, Knt.

} *Justices.*

} *Barons.*

Sir Lawrence Anderton, Baronet, *against* Commissioners
of the Forfeited Estates.

Case 25.

UPON AN APPEAL from the decree of the commissioners, &c. to the delegates, the case appeared to be thus :

Whether a
monk professed
is capable of
taking an estate,

Sir Lawrence Anderton being the eldest son of his father went to *Doway*, and there became A MONK ; thereupon *Francis*, * the next brother of *Sir Lawrence*, assumed the title, and possessed himself of the estate of the family, but being concerned in a rebellion, and taken prisoner at *Preston* in *Lancashire*, he was tried and found guilty of HIGH TREASON ; and being pardoned as to his life, the commissioners seized the estate ; and thereupon *Sir Lawrence* (the monk) claimed it, insisting before the commissioners, that his brother *Francis* had no right,

* [55]

THE

Trinity Vacation, 9. Geo. 1. Before the Delegates.

SIR
LAWRENCE
ANDERTON,
BARONET,
against
COMMISSIONERS OF
FORFEITED
ESTATES.

THE COMMISSIONERS having examined *Sir Lawrence* upon oath, by virtue of a power given them by that statute, which vests the forfeited estates in the king; and upon his said examination, he having confessed he was A MONK, they decreed for the crown, for that by the appellant's profession he was dead in law, and by consequence incapable to take; and therefore the estate must immediately vest in his brother *Francis*, who being attainted of treason, the estate must be forfeited: and thereupon, by the opinion of four of the commissioners against three, a decree was made for the king.

From which decree *Sir Lawrence Anderton* appealed to the delegates, who were *Justice POWYS*, *Justice TRACY*, *Justice FORTESCUE*, *Baron MOUNTAGUE*, and *Baron PAGE*; and the case was argued at *Serjeants Inn Hall* in *Fleet street*, by *SIR PHILIP YORKE*, *Solicitor General*, in behalf of the appellant, and by *SIR ROBERT RAYMOND*, *Attorney General*, for and in behalf of the commissioners.

THE COUNSEL for the appellant insisted, that there were two reasons which might induce the Court to reverse this decree: FIRST, For that it does not appear that the appellant is a *monk professed*; for though upon his examination he confessed he was A MONK, yet he may be a *monk*, and not a *monk professed*; but if he was (which is not proved in this case) yet he is capable of taking this estate; for though at common law, a *monk professed* was dead in law, and by consequence incapable of taking an estate, yet since such disability did arise by some canons of the popish church (which was the ruling church at that time), and those canons being now abolished by act of parliament, and there is no means left to try whether a man is a *monk professed*, or not; therefore such profession shall work no incapacity in any man to take and enjoy an estate; so that if it could be proved, that the appellant was a *monk professed*, yet this decree ought to be reversed.

* [56]

ON THE OTHER SIDE it was argued for the respondents, that the appellant being taken into and living in a *convent* in foreign parts, there could be no possible means of proving him a *monk*, but by his own confession; and he having upon his examination confessed himself to be a *monk*, it must necessarily follow he is professed, because he is not a monk till profession. And as a monk professed was by the common law of *England* made incapable of taking or enjoying an estate, because he was accounted dead in law; so it was not by the canons alone of the popish church, but even by the common law of this nation, that such incapacity did arise; therefore the same disability still remains, unless it can be shewed that there is some statute which enables a monk professed to take and enjoy an estate, which they do not on the other side pretend to shew.

THE SOLICITOR GENERAL replied, that, if to say a man is a *monk* must imply that he is a *monk professed*, then the constant addition

Trinity Vacation, 9. Geo. 1. Before the Delegates.

addition of that word in our law-books would be impertinent, which it is not, for it is always used to shew the difference between a monk and a *monk professed*. But admitting the appellant is a *monk professed*, yet the law, as now established, doth not take any notice of such profession; and if it was a disability, it is not so now, because there is no method of trying, whether a man is a monk professed, or not, for the trial at common law was by the certificate of the bishop; but as the law now stands, no bishop can certify a profession of being a *monk*; therefore it would be a very great hardship if this should work an incapacity, when there is no means of trying it; and if it cannot be tried, then it is plain that the law doth not take any manner of notice of it.

SIR
LAWRENCE
ANDERTON,
BARONET,
against
COMMISSIONERS OF
FORFEITED
ESTATES.

THE DECREE was reversed by the opinion of the other four against MOUNTAGUE, so far as to order, that the appellant might bring an ejectment against the commissioners, and try his title at law; and that the decree should not stand in his way.

But in a little time afterwards *Sir Lawrence* took the oaths, and received THE COMMUNION according to the church of *England*, and became a *protestant*, and so enjoyed his estate without any farther trial.

MICHAELMAS

MICHAELMAS TERM,

The Tenth of George the First,

I N

The Year

1722,

I N

The Court of Chancery.

The Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

Halfpenny against Udale.

Case 26.

Ex relatione Magistris BUCKLEY.

BY A MARRIAGE-SETTLEMENT, lands were conveyed to the husband for life, to the wife for life, to trustees to preserve contingent remainders, remainder to the first and every other son in tail, remainder to *A.* and *B.* for five hundred years to raise younger childrens portions, &c. ; whereas the term for five hundred years ought to have been created precedent to the limitation in tail to the first son. The first son, when he came of age, by a recovery, cut off the term for years.

Chancery will
assist provision
for younger
children.

To be relieved against which recovery, and that some provision may be made for the younger children, a bill was exhibited in chancery.

SIR JOSEPH JEKYLL, *Master of the Rolls*, upon hearing the cause, made a decree accordingly ; for it plainly appears to be the intent of the parties, that the younger children should be provided for, which this Court ought to assist.

Newland

Case 27.

Newland against Sheppard.

A freeman of London having one daughter, and several grandchildren by her, devised his personal estate to pay debts and legacies; and afterwards what remained to be sold, and the money arising by sale, (viz.) the interest, to be paid to his grandchildren, share and share alike, until of age, but did not dispose of the principal sum; and now his daughter, who was heir at law, and her husband, exhibit a bill to have the principal.

* [58]

S. C. 2. Eq. Ab.
329.
S. C. 2. Peer.
Wms. 194.

THE PLAINTIFF married the daughter and heir of *Sheppard*, a freeman of *London*, by whom he had issue one son and several daughters; which said freeman, by his last will, devised his freehold lands to the defendant his wife for life, remainder to his grandson (who was the son of the plaintiff) for life, remainder in tail to his first son, &c. with like remainders to his grand-daughters, according to their seniority, and not as *coparceners*; and as for his personal estate, he devised, that after his debts and legacies were paid, the residue should be placed out at interest, and that the said interest should be paid to his said grandchildren, share and share alike, until they were of the age of twenty-one years (a), but did not dispose of the principal.

And now the plaintiff exhibited his bill to have two thousand pounds, part of the portion of his wife, which was unpaid at the time of the death of her father (b), the said testator, with interest for the same in nature of a creditor, and for an account of his personal estate, which, by the custom of *London*, did belong to his (the plaintiff's) wife, as only child to the testator, her father, who had made no disposition thereof (c).

* The defendant, the widow, owned in her answer, that the testator was a freeman of *London*, but insisted, that the plaintiff's wife was advanced in his life-time, and so is not entitled to any part of his personal estate, unless she puts her share in *botchpot* (d); and she submits to pay the two thousand pounds, but without interest, and insists on the devise of the real estate to her for life, &c.

(a) The testator, after disposing of some part of his real estate, and of some legacies, devised the residue of his real and personal estate unto trustees, their heirs, executors, and administrators, in trust to pay and apply the produce and interest thereof for the maintenance and benefit of such of his grandchildren by his said daughter *Newland* as should be living at the time of his decease, until his said grandchildren should come to the age of twenty-one years, or be married; and that if all his trustees should die, his son-in-law *Newland* should be a trustee. S. C. 2. Peer. Wms. 194.

(b) The testator agreed to give the plaintiff in marriage with his daughter the sum of 7000*l.* to be paid by instalments of 1000*l.* a-year, and had paid 5000*l.* of this portion, but died before the other instalments became due. 1. Eq. Abr. 251.

(c) But now by 11. Geo. 1. c. 18. s. 17. "A freeman of the city of *London* may give, devise, will, and dispose of his

"personal estate to such person and to such use as he shall think fit, any custom or usage of or in the said city, or any bye law or ordinance made or observed within the same, to the contrary notwithstanding: PROVIDED NEVERTHELESS, he may agree, by any writing under his hand, upon or in consideration of his marriage, or otherwise, that his personal estate shall be subject to, or be distributed according to, the custom: AND IF such freeman shall die intestate, the personal estate of such person so making such agreement, or so dying intestate, shall be subject to, and distributable according to, the custom of the city:" and for the custom of *London* on this subject, see 7. Viner's Abr. 214.

(d) See *Phiney v. Phiney*, 2. Vern. 638. *Edwards v. Freeman*, 2. Peer. Wms. 435. S. C. 1. Eq. Abr. 252. *Wood v. Fettyplace*, 2. Vern. 629. *Jenks v. Holford*, 1. Vern. 61. *Chafe v. Box*, 1. Ld. Ray. 484.

And

Michaelmas Term, 10. Geo. 1. In Chancery.

And on reading the proofs it appeared, that the portion of the plaintiff's wife carried interest from the day of her marriage, though part of it was not payable in several years afterwards.

NEWLAND
against
SHEPPARD.

Whereupon IT WAS DECREED, that the said two thousand pounds, with interest, should be paid (a), and that an account be taken by THE MASTER what the testator died worth, and then the Court would consider what was to be done with the principal money not disposed; but declared, that it would be a hard construction of this will, that the grandchildren should have the interest thereof during their minority, and no share of it when they came of age (b).

And as to the measure of the account to be taken by THE MASTER, it being insisted, that it should be according to the computation of the value of the personal estate at the time of the death of the testator, and not as lessened by any accident;

THE COURT declared, that if the estate had increased in the hands of the executor, the plaintiff would have expected the benefit of such increase; and it is but equitable that he should be contented with the loss; but that being occasioned by the *South-Sea Company*, the act of indemnity discharges all trustees and executors.

And as to the principal sum undisposed, THE COURT took time to consider of it, in respect to the children, until THE MASTER had made his report.

(a) See 1. Eq. Abr. 251.

194. Hewit v. Ireland, 1. Peer. Wms.

(b) See Rex v. Melling, 1. Vent.

427. Peat v. Powell, Ambl. 387.

250. Kentish v. Newman, 1. Peer.
Wms. 234. Targus v. Puget, 2. Vezey,

White v. Barber, Ambl. 701 Fonnereau v. Fonnereau, 3. Atk. 326.

* [59]

Ashton against Bretland.

Cafe 28.

THE PLAINTIFF exhibited a bill against the defendant to be quieted in the possession of certain lands which he held by lease under the defendant, who had brought an ejectment, and endeavoured to turn him out.

The case was as followeth:

Serjeant Bretland granted a lease of these lands to one *Ashton* for ninety-nine years, if three lives (naming them) or any of them should so long live; which lease was granted upon a surrender of an old lease of the same lands to *the Serjeant*, * and was to be pursuant to the covenants in the old lease, one of which was, that it was mutually covenanted, that upon the death of any of the three lives, the lessee should surrender the old lease, "if it was his will so to do;" and thereupon *the Serjeant* covenanted, that upon such lease the covenant to surrender as a life drops be made absolute equity will assist the lessee to retain possession, as if the prior lease had continuance.—S. C. 2. Eq. Abr. 57. Post. 112. Prec. in Ch. 76. 762. Ch. Rep. 29. 2. Peer. Wms. 217. 1. Vezey, 387. 238. 2. Com. Dig. "Chancery" (2. T. 7.).

If in a lease determinable on three lives it is covenanted, that on the death of one the lessee may, if he please, surrender, and that the lessor shall thereupon, and upon payment of a fine, grant a new lease for three lives in the terms of the old lease, and in the new

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ASHTON
against
BRETLAND.

surrender and payment of an heriot and eight pounds, he would grant a new lease for three lives, &c.

Now in this new lease, the covenant was drawn, that *Ashton*, on the death of any of the three lives, would absolutely surrender the same, and pay a heriot and eight pounds.

And one of the lives being now dead, and the plaintiff refusing to surrender this lease, and renew it upon payment of the said heriot and fine, the defendant brought an ejectment, and the plaintiff exhibited this bill, and got an injunction, the end of which bill was to be relieved against the covenant in the new lease, and that for two reasons.

FIRST, Because *Serjeant Bretland* had so settled his estate, that the now defendant was only tenant for life, and by consequence, if he should surrender the lease, the defendant had no power to grant a new lease for three lives; so that since the plaintiff cannot have the benefit of the covenant for his advantage, it is not reasonable that he should be obliged to the performance of that part of the same covenant to his disadvantage; and that the defendant should be at liberty to take any advantage of a disability occasioned by his being made tenant for life.

SECONDLY, It was suggested in the bill, and likewise proved, that this new lease differed from the old lease, which was to be the rule of the new one; for that it was drawn by *the Serjeant* himself, with a covenant, "that the lessee should absolutely surrender the same upon the death of any of the lives, and pay a heriot and eight pounds, when the old lease was to surrender, "if it was his will so "to do," which is not obligatory, but left to his discretion; but by the new lease he is bound to surrender, and renew, and pay an heriot and fine upon the death of every life.

All which appearing on proofs, THE LORD CHANCELLOR decreed, that since the plaintiff was a purchaser of this lease (as every lessee is), the subsequent settlement made by *the Serjeant*, by which the defendant is made tenant for life, shall not prejudice him (the plaintiff), nor forejudge him of the benefit of any covenant in his lease; so as to that point, there is no reason to excuse the plaintiff for non-performance of the covenant on his part, because the defendant * is to all intents liable to perform that covenant on his part.

* [60]

But as to THE SECOND POINT it is clear, that *the Serjeant* himself (who drew the new lease) did draw it in a different manner from the old one, which should have been the standard to guide him, and that it was drawn for his own advantage; but in equity it shall be taken as if it had squared with the old lease; so that if the lessee is not willing to renew, he shall be quieted in his possession under the new lease as if he held by the old lease.

Mead

THIS was a bill brought by the plaintiff to be relieved against a verdict and judgment at law (a).

A goldsmith's note was given in part of payment of money on a *Saturday*, and not offered to the drawer until the *Monday* following; this is no new credit given to the drawer, but the indorser is still liable.

THE CASE upon the pleadings was thus: The plaintiff in the year 1720 gave a note drawn by *Cox and Cleve*, goldsmiths, for seventeen hundred and fifty-eight pounds, to the defendant, in part of payment of money due to the defendant from the plaintiff. It is a custom among the goldsmiths in *London* to balance their accounts every day, but especially on every *Saturday*, when they clear up the accounts of the whole week. This note was delivered to the defendant on a *Saturday*, about eleven of the clock in the morning, and he might have received the money that very day of the goldsmiths; but he did not offer the note to them until the next *Monday*; and then, about ten in the morning, he offered it, which the cashier cancelled; and the servant might have received the money (as the plaintiff suggested) if he had stayed, for that the goldsmiths *Cox and Cleve* had paid above twenty thousand pounds that morning, but the servant went away; so that it was through the defendant's negligence the money was not paid, and that his delay from eleven o'clock on *Saturday* until five in the afternoon on the *Monday* following was a new credit given by him to those goldsmiths; and for that reason, he (the plaintiff) insists, that the defendant shall not have recourse to him (the plaintiff); and the rather, because his note was cancelled by the cashier, who gave another note of the same date, and for the like sum, at five of the clock in the afternoon of that *Monday*; but it was after those goldsmiths were become bankrupts; upon which note the verdict and judgment was had: and the plaintiff * insists, that he cannot, by virtue of such note, be accounted by the commissioners of bankrupts to be a creditor to these goldsmiths within any of the statutes of bankruptcy, though this note bears even date with the original note so cancelled; for that the time of making it is the true date, which was after they were bankrupts.

* [61]

ON THE OTHER SIDE it was confessed, that this note was received by the defendant on a *Saturday*, and that the custom amongst goldsmiths in *London* is as suggested by the plaintiff; but that it is likewise the custom amongst them for one servant to go every day to offer all the notes passed to his master that day to them who drew such notes, and to receive the money, and when he returns home to make a separate entry of all which he received, and then to pay it over to the cashier. That on that very *Saturday* the defendant had received several goldsmiths notes as payment, and which were drawn by them who lived at *Charing-Cross, Covent-Garden*, and in the *Strand*, which notes he sent by his servant on that very day to the several goldsmiths who drew the same in that

(a) See *Hayward v. Bank of England*, 1. Stra. 550.

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MEAD
against
CASWELL.

part of the town, and his said servant did on that *Saturday* receive of those goldsmiths twelve thousand pounds for his (the defendant's) use, in his way of trade. That it is likewise a custom amongst goldsmiths not to pay any money after five of the clock in the afternoon, but to employ the rest of the day in adjusting their accounts; and that his servant returned from that end of the town on that *Saturday* about half-an-hour after four, and began to enter in his books all the sums he had then received; but before he could make an end, the hour was past for payment of money amongst merchants, which was the reason he did not offer this note on *Saturday* to the goldsmiths who drew it. That on the next *Monday* morning he sent his servant with the note to the drawer, and gave him no order to stay, only to demand payment of the money; but that he accordingly offered the note to the drawer, which the cashier cancelled, and desired the servant to call in half-an-hour, for that *Cox and Cleve* were gone to *the Bank* to receive money. Thereupon the servant went away, and returned within half-an-hour; and not receiving the money at that time, he called twice more at the shop; and not receiving any, he returned to his master (the defendant), and told him, that the * goldsmiths could not pay it: whereupon the defendant went to their house, and finding the note cancelled, he had no remedy, but procured a new note of the same date with the original note, and for the same sum; on which he obtained a verdict and judgment, and insisted, that the note is no payment of the money, unless the defendant had given the goldsmiths some new credit, which he denied that he had given; and therefore insisted to have this bill dismissed with costs, and to be at liberty to take out execution on his judgment.

* [62]

THE COURT decreed, that though it appears there was some negligence in the defendant's servant, in not staying to receive the money on *Monday* morning, when the cashier cancelled the note in his presence, yet it would be hard to make the defendant suffer thereby. Therefore the Court dismissed the bill with costs (a).

(a) See *Hankey v. Trotman*, 1. Black. India Company v. Chitty, 2. Stra. 1175.
Rep. 1. *Taffell v. Lewis*, 1. Ld. Ray. Fletcher v. Sandy, 2. Stra. 1248.
743. *Holm v. Bary*, 1. Stra. 415. Hoar v. Da Costa, 2. Stra. 910. Met-
calf v. Hall, Beaves L. M. 482. Apple-
ton v. Harrison, 1. Stra. 308. East ton v. Sweetapple, Bailey on Bills, 32.

Case 30.

Alison's Case.

The mother gave a bond to her son, conditioned to surrender a copyhold estate to him, of which she was heir. DECEED, that she was a trustee for her son.—S. C. 10. Mod. 515. 1. Ch. Cases, 39. 171. 3. Ch. Rep. 4. 2. Peer. Wms. (630). 2. Com. Dig. "Chancery" (4 I.).

THE PLAINTIFF exhibited a bill against her niece for a moiety of a copyhold estate, which she claimed in coparcenary with her said niece, by descent from T. A. her brother.

The case was thus:

One *Alison*, the plaintiff's uncle, was seised of the inheritance of a considerable copyhold estate, and having no issue intended to

leave

Michaelmas Term, 10. Geo. 1. In Chancery.

leave it to his nephew *T. A.* the plaintiff's brother; but being taken ill, he had no time to surrender to the use of his will, and for want thereof the estate would descend to his sister, who was his heir at law, and mother of the plaintiff; and to prevent such descent, the said *Alison* procured his said sister to enter into a bond of two thousand pounds to the said *T. A.* her son, conditioned, that at any time upon his request she would convey the said copyhold lands to him and his heirs. Pursuant to this agreement *T. A.* entered after his uncle's death, but without any conveyance from his mother, and some time afterwards he died without issue, but had two sisters, one of them entered, and surrendered to the use of her will, and devised this estate to her grand-daughter, and died.

ALISON'S
CASE.

And now the surviving sister exhibited this bill to have a moiety of the estate in coparcenary with her niece, as heir to her brother *T. A.* deceased.

* THE COUNSEL for the plaintiff insisted, that upon the foot of the agreement with her uncle *Alison*, and the bond of two thousand pounds which his sister gave to surrender at any time when *T. A.* her son should require it, that she shall be deemed as a trustee for her son, especially since she had carried the agreement into execution, by permitting him to possess the land during her life, though she was heir at law to her brother *Alison*. And this is a stronger case than that where the father being about to make his will, and intending to make an executrix, his son said, that if he (the father) would appoint him, the son, to be executor, it would give him some countenance in the world: and that if his father would do so, he, the son, would be only a nominal executor, and that his mother should have the benefit of it; whereupon he was made executor; but after the death of his father he insisted on the benefit of the executorship: which was set aside by the decree of this court made by the Lord Chancellor COWPER, upon proof of this promise, though there was nothing in writing (a).

* [63]

And in the principal case, THE LORD CHANCELLOR decreed, that the mother was a trustee for her son (b); and therefore, that the defendant should surrender to the use of the plaintiff, and both of them be admitted as coparceners.

- (a) Neeve and Others v. Keck, post. 287. Sellach v. Harris, 5. Viner A'r. 106. Thynn v. Thynn, 1. Vern. 296. 521. Maxwell v. Montacute, Prec. Ch. 526. and Mr. Fontblanque's Equity, Rep. 13. Devenish v. Baines, Prec. 2 vol. 38.
(b) See Herbert v. Lownds, 1. Ch. 3. Barnsley v. Powell, 1. Vezey,

Waller against King.

Case 31.

THIS was a bill brought against the defendant to set aside an award, and also a judgment and execution got on a bond, and a warrant of attorney extorted from the plaintiff *Waller* by duress, grounds of its being unreasonable, and that the party, after notice to attend, was not heard.—S. C. 2. Eq. Abr. 92. 1. Roll. Rep. 380. Chan. Cases, 270. 2. Ch. Cases, 140. 1. Vern. 157. 239. 1. Ch. Rep. 141. 2. Com. Dig. "Chancery" (2. K. 6.). Kyd on Awards, 236.

Michaelmas Term, 10. Geo. 1. In Chancery.

WALLER
vs.
KING.

and to have restitution of the money levied by sale of goods taken in execution.

The case was thus :

The plaintiff *Waller* was arrested at the suit of the defendant, and thereupon both parties submitted all differences between them to two arbitrators ; and that if they could not agree in an award, then to an umpire ; and the arbitrators not agreeing, the umpire awarded thirty-six pounds to be paid by the plaintiff to the defendant, without hearing the plaintiff. Thereupon an action of debt was brought against him for non-performance of the award ; and being under an arrest, a bond was extorted from him, and a warrant of attorney thereon to confess judgment, which was entered and * execution taken out, and goods were levied to the value of forty pounds ; all which the plaintiff prayed might be set aside.

* [64]

The defendant in his answer set forth, that he held lands by lease under the plaintiff ; and that being indebted to several persons, the plaintiff, his lessor, persuaded him, the defendant, to make over his goods, and to deliver up his lease to him, the plaintiff, on purpose to protect the same against his creditors, which was done accordingly ; but that the plaintiff abused the trust, and insisted that the goods were his own, by an absolute surrender made thereof by the defendant : and this being the greatest cause of difference between them, it was referred to arbitration ; and all this matter appearing to the arbitrators in the presence of the umpire, he made the award, &c.

THE COUNSEL for the plaintiff argued, that the award ought to be set aside, because it was made without the privity of the plaintiff, and therefore he could make no defence against it ; and that it was a very unreasonable award (a), because it appeared upon the proofs, that the plaintiff had goods of the defendant to the value only of seven pounds ten shillings, and no more, and yet he was awarded to pay thirty-six pounds, which is a very hard award.

THE COURT would not set aside the award upon account of any hardship therein, because the arbitrators were judges of the party's own chusing (b), and the plaintiff had notice, and might have been heard if he pleased.

Therefore IT WAS DECREED, that the bill should stand dismissed, with costs.

(a) That an award must be reasonable, see 1. Roll. Abr. " Arbitrament," B 12. *Linsley v. Ashton*, 2 Bulst. 39. *Anonymous*, 1. Keb 92. *Tavener v. Shingley*, Cro. Car. 226. *Alley v. Cox*,

3. Keb. 479. *Godfrey v. Godfrey*, 2. Mod. 304.

(b) See *Jones' Case*, 1. Roll. Rep. 380. *Brown v. Brown*, 2. Ch. Cases, 140. S. C. 1. Vern. 157.

UPON an appeal from a decree of commissioners of charitable uses (a),

A grant of land to charitable uses, viz. "that as many of the inhabitants of the parish of A. as were able to buy three cows might feed them on the land from May to August," extends to every inhabitant who has three cows.

THE CASE WAS: A certain piece of land called *the Lizard*, in the parish of *Wimmerton*, containing about forty acres of pasture, was formerly the inheritance of two persons, who several hundred years past conveyed the same to trustees and their heirs, to the use of themselves, and the survivor of them, for life, and after their decease, to the intent, that as many of the inhabitants of that village as were able to buy three cows might put them there to graze, in the day-time, from the first *Monday in May* to the first day of *August* for ever; and from that day to be in common for all the inhabitants * there until *Lady-Day* following, and then to be inclosed for raising the graze until the first *Monday in May* for ever.

* [65]

But this grant not appearing before the commissioners, it was pretended that the lands were given to the poor of that parish; and that about one hundred years past, the town and the church where this grant was kept, were burnt; and so the evidence that it was given to the poor was destroyed by fire (b).

Whereupon the commissioners decreed, that *Sir John Hobert*, who was lord of the manor, should make a feoffment of these lands to the use of himself and others, and their heirs, in trust, to put out some of the poor boys of that parish every year to some trades.

From which decree the plaintiff appealed (c), and objected against it, that there was no proof before the commissioners that this land was given to the use of the poor of that parish; so that they had no power to make such a decree.

And now, upon producing the original grant before the commissioners (which was not burnt, as it was suggested), it appeared to be as above mentioned, by which no manner of difference was made by the grantors between the rich and the poor inhabitants (d) of that village.

THE COURT was not satisfied why this original grant was not produced before the commissioners, but saw no colour to judge that these lands were given to the use of the poor, for that by the grant itself the contrary appeared; and it was proved, that the usage had been according to the grant for sixty years past; therefore there being no proof that this was given to the poor, exclusive of the rest of the inhabitants, the commissioners had no authority to make such a decree; for which reason it ought to be reversed.

(a) See 43. *Eliz.* c. 4. 9. *Geo.* 2. c. 36.

(c) *Burford v. Lenthall*, 2 *Atk.* 557.

(b) See *Askew v. The Poulterers Company*, 2. *Vezey*, 89. *Clayring v. Clavering*, 2. *Vezey*, 233.

(d) See *Duke on Charitable Uses*, 132.

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And IT WAS DECREED, that every inhabitant who had three cows should put them to graze on these lands, &c. as in the original grant, &c.

That if this manner of grazing had been by prescription or usage, no person but the inhabitants of antient messuages could be entitled to it; but it is otherwise appointed by the grant (a) of the donors; and that there is no colour of costs (b) against the commissioners, who contested nothing in their own right; not but that the Court would have punished them, if it had appeared they intended to oppress.

(a) Baylis v. Attorney-General, 2. Atk. 239. Attorney-General v. Burford v. Lenthall, 2. Atk. 550. Middleton, 2. Vezey, 327. 6. Com. Jones v. Coxeter, 2. Atk. 400. Dig. "Uses" (N. 21.).

* [66]

Cafe 33.

* Anonymous.

If a Dutchman be possessed of real estate in *Holland*, and personal estate in *England*, and devise his real estate to A. and his personal to B. the personal estate shall be first applied to pay his debts in *Holland*, though real estate there is liable to debts.

Rumb. 260.
3. Peer. Wms. 322.
1. Brown. 58.
2. Com. Dig. "Chancery"
(3 A. 3.).

THE TESTATOR, who lived in *Holland*, and who was seised of a real estate there, and of a considerable personal estate in *England*, devised all his real estate to the plaintiff, and all his personal estate to the defendant, whom he made executor, and died. But at the time of his death he owed some debts by specialties, and some by simple contract in *Holland*, and had no assets there to satisfy those debts, other than by his real estate, which, by the custom and laws of *Holland*, is made liable to the payment of debts upon simple contract as well as upon specialties, if there are not personal assets to answer the same, especially debts upon simple contract for servants wages or for work done.

Now the creditors in *Holland* sued the plaintiff there, to whom the real estate was devised, and had a sentence against it, by virtue whereof it was sold for the payment of their respective debts.

Thereupon the plaintiff exhibited this bill against the defendant, who was executor, and to whom the personal estate was devised as aforesaid, that he (the plaintiff) might be re-imburshed by the defendant for the loss he had sustained in not bringing the personal estate to *Holland* to discharge the debts there in aid of the real estate.

An exemplification of a sentence in *Holland*, under the common seal of THE STATES, may be read in evidence in a suit in Chancery.

10. Co. 93.

Bull. N. P. 226.

893. Cowp. 318.

Upon hearing this cause, the plaintiff produced an exemplification of the sentence in *Holland*, under the common seal of THE STATES, in evidence, without any farther proof that such sentence was given there; for which reason,

THE COUNSEL for the defendant objected against the reading it; and this upon the authority of the case of *Swinerton v. Goddard*, in the house of lords, where it was settled, that the exemplification of any judgment or sentence in any court, where the

Sayer, 297. 2. Vent. 170. 2. Lev. 108. Hard. 120. 1. Mod. 117. 2. Ld. Ray.

proceedings

proceedings were by different laws from the laws of England, ANONYMOUS, should not be given in evidence without farther proof. That case was as follows: *Swinerton* being a Scotsman, and here in England, became indebted to *Mr. Goddard*, who obtained a judgment in the court of king's bench against him; thereupon *Swinerton* retired to Scotland, where he had some effects; and *Mr. Goddard* got an exemplification* of his judgment here, which he produced in evidence before the lords of the session in Scotland, upon a suit he brought there against *Swinerton*; but that Court would not admit it to be read without farther proof, but gave sentence against *Mr. Goddard*; who thereupon appealed to the house of lords here, and the sentence of the lords of the sessions was affirmed; and in the affirmance of that sentence a parallel case was cited, where in an appeal from Ireland, for that THE LORD CHANCELLOR there had founded his decree on the exemplification of a sentence given by the lords of the sessions in Scotland, without any farther proof, that decree was reversed in the house of lords here for that and for no other reason,

* [67]

ON THE OTHER SIDE it was insisted, that judgments are transferrable by exemplifications from one court to another; and this is seen by daily experience, where judgments in the civil law courts, as in the admiralty, are transferrable to other courts, &c. (a),

THE COURT. The principal case differs from that of *Swinerton v. Goddard*; for the plaintiff does not make the exemplification of the sentence in Holland the ground of his demand, farther than to shew, that there was a sentence there; for he must give the will and other proofs in evidence to make out his right, and then to shew how he was damnified. The plaintiff complains of a sentence given in Holland, and certainly he must be allowed to prove, that there was such a sentence; and this is done by the exemplification of it; and he does not found any demand here upon the sentence itself; but it is only to shew the Court that he suffered there; and he must give other proof to shew, that it was occasioned by the defendant, and in what manner; for that is the ground of the complaint in this court, and not any wrong by the sentence itself (b).

Now by the laws of Holland, all debts shall affect the real estate there; but it is there, as it is here, that the personal estate shall come in aid of the real estate, and be charged in the first place; therefore the personal estate in this case should answer the loss the

(a) 1. Roll. Abr. 678. Bull. N. P. 245. Cowp. 322.

(b) How far the sentences of foreign courts of competent jurisdiction are taken notice of as conclusive evidence by the courts in England, see Blackham's Case, 1. Salk. 290. Burton v. Fitzgerald, 2. Stra. 1078. Hughes v. Cornelius, 2. Show. 232. Ray. 473. Skin. 59.

Ewer v. Jones, 2. Ld. Ray. 936. Barnardi v. Motteux, Dougl. 54. Baragelly v. Lewis, Park on Insurances, 359. Saloneci v. Woodham, Park. 362. Saloneci v. Johnston, Park, 364. Mayne v. Walter, Park, 363. Ladbroke v. Cricket, 2. Term Rep. 649. Galbraith v. Neville, Dougl. 6. *nois*.

plaintiff

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ANONYMOUS. plaintiff sustained by the sale of the real estate, though that happened in a different dominion.

See Brook, "Custom," 43. Therefore IT WAS DECREED, that the plaintiff should be reimbursed.

* [68]

Cafe 34.

* Acherley against Vernon.

If a testator devise "all the rest and residue of his real and personal estate to A. B. G. and D. in trust;" and afterwards makes a codicil, whereby he "ratifies and confirms his will, except in the alterations after mentioned;" and then revokes that part of his will whereby he appointed A. and B. his trustees, and requests E. and F. to be two of his trustees, and devises his real estate to them accordingly; this is only a revocation as to the appointment of the two trustees, and not of any other part of the will.

S. C. 10. Mod. 518.

S. C. 2. Eq. Ab. 209.

S. C. 1. Peer.

Wms. 783.

S. C. Comy. 381.

S. C. 3. Bro.

P. C. 107.

* [69]

THIS was a bill exhibited by *Roger Acherley, Esq.* and his wife, and *Lætitia* their daughter, the wife being sister and heir at law to *Thomas Vernon, Esq.* deceased.

THE BILL sets forth, that *Thomas Vernon* was seised in tail of some lands, and of other lands for life, and was possessed of a personal estate to the value of eighty thousand pounds at the time of his death; and being so seised and possessed, he made his last will in the year 1711 (a), and thereby, after some legacies given to particular persons, devised "all his real and personal estate to four trustees (naming them) in trust, that they should permit the defendant *Bowater Vernon* to receive the profits of his real estate for life, remainder to his first son in tail, &c.;" and that the said trustees "should lay out his personal estate in a purchase of lands, which, when purchased, should be settled to the same uses, &c.;" and he devised to his sister (the now plaintiff) *Mrs. Acherley* two hundred pounds a-year during her life; and a little before his death in the year 1720 he made a codicil, and thereby confirmed his will, except such part as was by the said codicil revoked; and then he revoked that part of his will wherein *Mr. Acherley* (the now plaintiff) and one *Mr. Vernon* were made trustees, and appointed *Mr. Keck* and *Mr. Nicholls* to be his trustees; and devised to his niece *Lætitia Acherley* six thousand pounds, and declared, that the same, and the annuity of two hundred pounds a-year, which, by his will, he had devised to his sister for life, should be in lieu of all demands they or either of them might claim of, or unto, all or any part of his real or personal estate; and upon condition they should release to his said trustees all their right thereunto; and all the rest of his lands which he purchased since the making his will, and all other his real estate, he devised to his said trustees, to be settled according as in the will.

The plaintiffs by their said bill insisted, that by this codicil the testator had revoked a great part of his will, and had made no other disposition of what he had revoked, and consequently that the same ought to descend to the said *Mrs. Acherley* as his heir at law; AND THAT having purchased some *fee-farm rents*, issuing out of the manor of *Hanbury*, and having entered into articles for the purchase of several lands lying in the counties of *Worcester*, *Warwick*, * and *Leicester*, since the making his said will, the said rents and the lands which rested in articles would not pass by the devise

(a) See the will and codicil very fully stated, 3. Brown's Cases in Parl. 107.

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of "all the rest of his lands, &c." in the codicil ; and therefore must likewise descend.—AND THAT the said testator had some valuable *manuscripts of cases* decreed in the court of chancery whilst he attended that court, which the plaintiffs now claim as their right, in order to have them published in the best manner, as a monument of his great learning, to be transmitted to posterity ; and that it is a right vested in them before any other person whatsoever, being his heirs at law ; and therefore shall descend to them in nature of heir-looms.

The defendant *Bowater Vernon* by his answer confesses the will, and that after the making thereof the testator bought several lands, and entered into articles for the purchase of more, and that part of the purchase-money was paid : and having increased his personal estate, he made a codicil, as set forth in the bill ; but insisted, that so much of his estate as rested in articles shall pass in equity by the devise of "all his new-purchased lands" in the codicil ; and so shall the *fee-farm rents* issuing out of the manor of *Hanbury* ; for that they were afterwards merged in the purchase of that very manor by the testator himself, who at the time of his death, and long before, was lord thereof. And farther insists, that by THE CODICIL none of the devises in the will are revoked, but rather confirmed ; but if it should be a revocation of what was devised by the will, yet the lands shall pass by that clause in the last part of his codicil, where he devised "all the rest of his lands, &c." to his trustees, &c. ; so that he left no part of his estate, either real or personal, undisposed.—And as for the *manuscripts*, he submits to the opinion of the Court, whether the trustees should have the publishing them, to whom the testator had entrusted the rest of his real and personal estate.

The other defendant, *Mrs. Vernon*, the widow of the testator, by her answer says, that he left her an annuity or rent-charge of one thousand pounds a-year during her life, besides what lands were about his house at *Hanbury*, whilst she lived therein nine months in every year, and the household goods and furniture of his house in *London*, which she insists to have secured to her as the Court shall think fit. * She likewise claims two hundred pounds which was left to her by her father *Sir Anthony Keck* to be laid out in what she thought fit in remembrance of him ; which two hundred pounds she believes was received by the testator, and therefore insists to have it satisfied out of his personal estate.—And as for the *manuscripts*, she claims them as part of the testator's household goods devised to her for her life ; so that she insists on her right to them, that they may be published for the credit of the testator, and not that she claims the least benefit by them.

* [70]

There was A CROSS-BILL exhibited against the plaintiffs in the original bill, which charges, that *Mr. Acherley* and his wife have received the annuity of two hundred pounds a-year devised to the wife on the condition mentioned in THE CODICIL ; so that they are thereby concluded from any farther demand of the testator's estate,

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estate, but shall be obliged to perform the condition and release as therein is directed. And farther, that the legacy of six thousand pounds devised to the plaintiff *Lætitia* is ready to be paid on the condition aforesaid; and therefore that she ought to determine her election, whether she will accept the legacy upon the said condition, or renounce it, and take what benefit she may have by her title to a distributive part of the testator's personal estate.

The questions arising upon these pleadings were :

FIRST, Whether the revocation in the codicil of that part of the will where *Mr. Acherley* and *Mr. Vernon* were made trustees, and appointing others, had revoked all the dispositions in that clause of the will.

SECONDLY, Whether the lands which the testator had *articled* to purchase, and likewise the *fee-farm rents* of which he was seised, and which were not mentioned either in the will or codicil, shall pass by the devise of his lands in the codicil.

THIRDLY, The testator having both *freehold*, *leasehold*, and *copyhold* lands, and having in his will declared a trust only of his *freehold* and *leasehold* lands, without mentioning his *copyholds*, whether any trust thereof should result to the benefit of the heir at law.

AS TO THE FIRST POINT,

IT WAS ARGUED *for the plaintiff*, that by revoking that part of his will where *Mr. Acherley* and *Mr. Vernon* were trustees, he had revoked all the dispositions in his will, because they were trustees in all of them, for he did not revoke * the trust to them, but that part of his will where they were trustees, which is every part; for they were concerned throughout the will; and though by the codicil he devised the "rest of his lands to *Mr. Keck* and *Mr. Nicholls*," yet he having declared no trust thereof, they shall be seised of a *resulting trust* for the heir at law. It is for his benefit that revocations are favourably construed, to bring back the estate to him; and the same words in a limitation of an estate have been enlarged in favour of the heir at law, and strengthened in the construction when against him: as for instance; in the case of *Nottingham v. Jennour* (a). So where a man releases part of a bond, it is a release of the whole bond; and by the same reason, a revocation of part shall be a revocation of the whole (b).

(a) This was a devise of lands to his second son, and his heirs for ever, and for want of such heirs, then to the right heirs of the testator, who died, and so did the second son without issue, living his elder brother: Adjudged, that the second son had an estate-tail, and no more; because these words, and for want of such heirs, are void in point of limitation, and import no more

than want of such issue, because the second son could never die without heirs, so long as his brothers, or any heirs of his father, were living; therefore the heir at law, in this case, shall take by descent, and not by the will. Salk. 233.

(b) Co. Lit. 265. a. Cro. Jac. 300. 487. 2. Mod. 281.

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AS TO THE SECOND POINT,

It was argued, that by the devise in the codicil of the lands purchased since the making his will, the lands for which he had *articled* shall not pass, either in law or equity, as this case stands, because the time of conveying them to the testator was not come before his death, so that he had no consummate equitable interest therein, and consequently could make no disposition thereof (a).

Nor shall the *fee-farm rents* pass by a devise of "all his lands" since purchased," for there are no descriptive words thereof to make them pass (b). Besides, "rents" cannot pass by a devise of "lands," unless where the testator had no lands, for in such case they shall pass, to make the words of the will operate; and as for the *fee-farm rents* which issued out of his own manor, they were not *extinguished*, but only *suspended* during his life, for they could not be *merged*, because his wife had an intermediate estate for life in the manor. Now to construe that "rents" shall pass by a devise of "lands," is a very hard construction in favour of a voluntary devisee against an heir at law, and there is not a case in any law-book to warrant it. It is true, there is a case in *Leonard* (c) where it was held, that by the devise of *a manor* the *rent* passed, but it was because the testator had no other right * in the manor but this rent; and therefore the devise had been void if the rent did not pass. But if it should be objected, that by a devise of "lands" all his interest therein would pass, this is contrary to several resolutions in the law (d). Besides, where the words are doubtful, the heir at law shall not be disinherited (e). If it should be likewise objected, that upon an *elegit de medietate terræ*, by the statute of *Westminster the Second*, "rents" were extendible, that case in *Cro. Eliz.* (f) doth not warrant it; therefore no inference can be made from thence, that by a reasonable construction "rents" shall pass in a will by a devise of "lands." Now in that very case in *Croke* it is said, that a rent-seck would not be extendible; and since the statute *quia emptores terrarum*, if a man give lands in fee, reserving a rent, this is a rent-seck in a subject, because a tenure cannot be created at this day, and every fee-farm rent, when granted by the king, becomes seck, and therefore not to be extended.

If a man devise all his real and personal estate to trustees, and afterwards purchases a *fee-farm rent* issuing out of his manor and *contracts* for the purchase of land, and pays part of the purchase-money, but before the contract is completed makes a codicil, whereby he devises "all the lands by me purchased since the publishing of my will to the trustees in my will named," and then

* [72]

revokes the will as to two of the trustees, and appoints two others; the *fee-farm rents* and after-purchased lands, although the purchase be not completed at the time of his death, and also all his before-devised real estate, pass; for the codicil is a *revocation* of his will.

(a) *Roe v. Fludd*, Fort. 184.

(b) But see the case of the Countess of Bridgewater v. the Duke of Bolton, that *fee-farm rents* which the testator had contracted for at the time of his death will pass by a devise of "all my real and personal estate." 6. Mod. 106. S. C. 1. Eq. Abr. 177. S. C. 1. Salk. 236.

(c) *Inchley and Robinson's Case*, 2. Leon. 41. S. C. Owen, 88.

(d) But see *Cro. Jac.* 145. *Cro. Eliz.*

525. Owen, 155. 1. Lev. 212.

1. Bro. C. C. 437. 1. Burr. 268.

(e) Although the intention of the testator be ever so apparent, the heir at law must, of course, inherit, unless the estate is given to somebody else, per LORD MANSFIELD, *Gaskin v. Gaskin*, Cowp. 661.—See also *Moor*, 7. *Dyer*, 342. 2. Vern. 346.

(f) *Walsal v. Heath*, *Cro. Eliz.* 656.

2. Pr. Wms. 335.

3. Pr. Wms. 168.

Dougl. 716.

As

If a man possessed of freehold, leasehold, and copyhold lands, devise "all his real estate to trustees," without mentioning his copyholds, yet if it appear by a codicil to have been the intention of the testator, the copyholds shall pass accordingly, and not result to the heir at law.

AS TO THE THIRD POINT,

It must be admitted, that by a devise of "all his lands," those copyholds which have been surrendered to the use of the will shall pass to the trustees (a); and so it will by the words "all his real and personal estate," but there is no manner of trust declared, either in the will or codicil, of his copyhold lands. The only words in the will by which any trust is declared are, "as for and concerning my freehold and leasehold estates, the same shall be to such trusts, &c.;" which words "freehold and leasehold" are exclusive of the copyhold: so that he having declared no manner of trust of his copyhold estates, the trust thereof must result to the benefit of the heir at law. It is true, by the statute of Frauds (b), all trusts not manifestly shewn by some writing are made void; but this must be intended of an express declaration of trust, and not of any implied or resulting trust; and this appears by another paragraph of the same statute, where the testator's intent is to be no farther admitted than it is expressed in the aforesaid limitation of a trust to a stranger (c); therefore if his intent is doubtful, it shall be construed for the benefit of the heir, because all the trust not disposed must result to such heir; so that if the Court should be of opinion, that the will is not revoked by the codicil, this copyhold must descend. But admitting no trust is declared of the copyholds, it can be no imputation upon the character of the testator to say, * he made a will, and did not appoint what trust his trustees should have in the lands he devised; for as great a man as he was in law, another as great as he hath made very strange bequests in his will, and that was SERJEANT MAYNARD; and probably it might be the design of those great men to exercise the wits of those of their own profession: it was clear, that this was intended by THE SERJEANT, for after some very unusual dispositions in his will, he takes notice, that some men might admire at it, but that he did not care, *valet quantum valere potest*.

* [73]

ON THE OTHER SIDE it was argued for the defendant:

AS TO THE FIRST POINT, That the principal point in this case was, Whether the codicil was a *revocation* of his will; and his Counsel insisted, that it was not, for it was no more than an *appointment* and substitution of other trustees in the room of those

(a) Goodwin v. Goodwin, 1. Vez. 226. Haselwood v. Pope, 3. Peer. Wms. 322. Tendril v. Smith, 2. Atk. 83. Smith v. Baker, 1. Atk. 386.

(b) By 29. Car. 2. c. 3. f. 7. "All declarations or creations of trusts or confidences of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party, who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect."

(c) By 29. Car. 2. c. 3. f. 7. it is provided, "That where any conveyance shall be made of any lands or tenements by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made."

whom

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whom he had appointed before by his will; there are no express words to revoke it, and a revocation shall be no more intended than the disinheriting an heir, for that must be by express words, and shall never be intended. Now according to such construction, which is contended for on the other side, this codicil would revoke itself; for by the first part of it he confirmed the devise to his first trustees, and afterwards revokes the trust to two of them, which is very inconsistent; but it is a more natural construction, that he revoked their estate in the trust, and appointed two other trustees to the same trusts, as before by his will. But by the whole course of the will it does not appear, that the testator intended any part of his estate should descend on his heir at law; therefore the will is not revoked by the codicil: if it should, then the annuity of two hundred pounds a-year given to his sister and heir at law is revoked, and so is the six thousand pounds given to his niece, because it was to issue out of the lands; but neither of them are revoked; and those specific legacies are sufficient to exclude them from any right they may have to the personal estate of the testator; like the case of *Bethell v. Bethell* (a), lately at THE ROLLS, where a man devised one shilling to his heir at law, this was adjudged an absolute exclusion from any right he might claim to the testator's estate.

It was insisted on by the will, and argued for the plaintiff, that the manuscripts should descend on the heir at law as heir-looms; but it cannot be presumed that the testator devised them to his trustees to be sold, and the money to be laid out in a purchase, &c. for they are not in their nature * a personal estate for any such purpose, and the heir at law has no pretence to have them as heir-looms, for those are by custom (b); but there can be no title by custom to these manuscripts, because the testator gave them a being, for they had none before his time.

* [74]

As to THE SECOND POINT, Whether the lands which the testator had articulated to purchase, and the fee-farm rents, shall pass by the devise of his lands in the codicil;

IT WAS ARGUED for the defendant, that they would pass. And first, as to the lands which he had articulated to purchase, those lands must be either a real or personal estate; it will be absurd to say they are neither; and if they are either, then there are sufficient words in the codicil to pass them; for the testator takes notice therein, that he had purchased lands since the making his will, which word "lands" shall extend as well to those for which he had articulated as to others which were actually conveyed to him, and shall pass by a devise of his "lands;" as in some cases by a devise of "all his free lands," a "portion of tithes" was adjudged to pass. So in the principal case, the word "lands" shall extend to all estates whatsoever: therefore the "rents" which he had purchased since the making his will shall pass by the devise of his "lands." Besides, the lands for which he had contracted did not

I. Ander. 132.

(a) Cro. Eliz. 810. Owen, 132. 2. And. 172.

(b) Co. Lit. 18.

all

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all rest in articles, for great part of the purchase-money was paid; but the heir can have no right to such lands if it is not a realty; and if it is a real estate, then it may descend; but whatever is descendible is devisable, and here it is devised by the words "real estate;" and though the time of conveying those lands was not come, yet that will make no alteration of the case; for the vendor is, from the time of the contract, deemed a trustee for the purchaser.

And as to the *fee-farm rents*, they shall be comprised in a devise of his "lands," especially those rents of that nature which issued out of his own lands; for the intervening estate made to the wife of the testator for life was by a devise of a rent-charge to her of one thousand pounds *per annum* for her life; and by her acceptance thereof those rents were merged in the reversion, and then by a devise of "all his lands" the rents will pass.

As to THE THIRD POINT. As to the testator's *copyhold estate*, the objection is, that he having declared a trust concerning his *freehold* and *leasehold*, and none of his *copyholds*, for they are not so much as mentioned, whether a trust thereof shall result to the * heir at law? And it was argued, that it should not, because there are sufficient words by which they will pass, and those are by a devise of "all his real estate." Besides, the testator never had the legal estate in those *copyholds*, but it was others in trust for him, which trust he hath devised; and the codicil is a republication of the will. Now there are authorities in point to prove, that *copyholds* will pass by a devise of his "real estate;" as where a *contract* was made for the purchase of lands, some of which were *copyholds*, it was adjudged, that by a devise of his "real estate," those *copyholds* would pass in equity; and this was the case of *Woodier v. Greenhill* (a). And so it was held in the case of *Davy v. Beardsham* (b), that *copyhold* lands would pass by the devise of his lands, if the devisee claimed them in time.

* [75]

How a legacy given "in lieu of all demands" shall be construed.

There was ANOTHER OBJECTION made in the behalf of the plaintiff as to that clause in the codicil where the testator directed, that what he had devised to his sister in the will should be "in lieu of all demands she might have out of his estate," that this clause might be satisfied by intending such demands as she may have in her own right. But in answer to this objection, it is absurd to say a thing shall be *intended* when it is plainly *expressed*; and here the words are, "in lieu of all demands;" neither doth the plaintiff pretend to shew any particular demands she had to the estate, which

(a) 2. Vern. 679.—See also Precedents in Chancery, 320.

(b) The testator had agreed for the purchase of a *copyhold*, and pursuant to that agreement a surrender was made out of court to his use; then he devised "all his lands to R. B. &c." and died

before admittance; it was decreed, that the *copyhold* lands shall pass, because the testator had a title in equity to recover them, and the vendor stood seised for him till a legal conveyance could be made. 2. Chan. Rep. 39.—NOTE to former edition.

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she ought to have done (if she had any) as an inducement to what is thus objected in her behalf.

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ANOTHER OBJECTION was, that the testator could not design to seclude his sister from having any share of his estate by those words in the codicil, where he takes notice that the devise of her annuity was upon condition she should "release all her right to his estate," because she being a *feme covert*, he very well knew that her release would not bar her. In answer to this objection, the word "release" in this place cannot be otherwise intended than an effectual release to bar her, which must be by fine, and no other release.

If an annuity be given on condition of "release" all right to the estate," it means a release by fine.
1. Pr. Wms. 783.
Post. 79.

* [76]

* The testator's widow being made a party to the bill, she by her answer, and now by her Counsel, insisted, that she might have some remedy for the rent-charge of a thousand pounds a-year given to her for life, either by distress or otherwise, for she could have none by the disposition in the will; and that she might have a decree for payment and satisfaction thereof, and of the arrears, and that a deduction of the parliamentary taxes might be apportioned to this rent-charge, in proportion to the rents of the lands out of which it issues; for that this being a rent-charge out of all the testator's lands, it would be in a great measure swallowed if it should pay more taxes than so much, issuing out of lands of the value of a thousand pounds a-year.

Quare, If the court of chancery will give a remedy by distress, &c. for a rent-charge devised to the widow of the testator.

THEN HER COUNSEL INSISTED, that she might be quieted in the possession of the lands which the testator had left her for life; and that she might have the legacy of two hundred pounds left to her by her father's will, with interest, to be laid out in what she thought fit, as a remembrance of him, this being a separate legacy, and received by her husband the testator.

Money devised to be laid out on a special trust carries no interest.

But as to this two hundred pounds it was objected, that the testator having received it many years past, and though for his own use and benefit, yet he shall not be taken as a debtor, because he had devised his plate, jewels, and a legacy of five hundred pounds to her, besides his coach and horses; and therefore it shall be presumed she was paid; for according to the ancient rule, *debitor non presumitur donare*, so that her long acquiescence shews her consent; and if no proof could be made that it was laid (as it really was) in a piece of plate, there is no colour for interest to be paid for it, because the property of that plate was in the testator whilst he lived.

Thereupon *Mr. Vernon*, the defendant, consented to pay the two hundred pounds, but without interest.

THEN IT WAS INSISTED for the widow, to have the manuscripts as part of the testator's household goods, which were devised to her; for though the personal estate is devised to trustees to be sold to purchase lands, yet these manuscripts are no part of the personal estate, for they are not assets to pay creditors, therefore shall not go

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over to the trustees; and they cannot be heir-looms, for the reason before mentioned.

But the widow and the other defendant *Bowater Vernon* agreed in court to have them published between them, without any profit to themselves.

* [77]

* Upon the whole matter it was concluded, for the defendant, that if this will should have such a construction as was contended for by the plaintiff, then the testator, notwithstanding all the pains he had taken to settle his estate, died intestate, and all his trouble was in vain; which is inconsistent with his character, who was an ornament in this court, where he attended, and who acted in all things with the utmost accuracy and exactness. But he acted in this as he did in all other cases, and made so good a will, that even artificial reasoning is hardly able to raise the least colour of doubt concerning it; so that it is a little surprising it should bear any manner of contest in a court of justice and equity.

LASTLY, It hath been said, that the heir at law shall not be disinherited without plain and express words for that purpose; but this saying is too general. It is true, if the words are doubtful, the heir shall be favoured (a); but if a man devise his lands to one, and in the same will devise the same lands to another, they are *joint-tenants*; which shews, that the will is to be construed as one entire clause, and not as different clauses; and by this means contradictions will be avoided in the construction thereof.

THE COURT. The principal question in this case is, Whether the *codicil* revoked the will, and shall be taken as a course of different words and phrases, or as one entire scheme consummated by the sealing?—And as to that matter, IT WAS HELD to be the best way to construe one part thereof with the other, as one entire scheme (b), and which was thought on and considered by the testator at one and the same time. It is absurd to say, that the *revocation* in the codicil of an immaterial circumstance in the will shall revoke the whole will, for it is no more than a revocation of part of his will, by which he had appointed two persons to be trustees, and appointing two other in their room; it is as if a person should set forth in a codicil, that T. S. whom he had appointed to be his executor, should not be his executor; this could never be taken as a revocation of the dispositions in his will. Now here the testator by his codicil appointed two others to be trustees, and he devised to them accordingly; this must be intended as joint-tenants of the trust with those already named in the will; for the words “other trustees” imply some not before named (c).

* [78]

* As to the lands for which the testator had contracted, the owners thereof continue trustees for the testator until conveyances

(a) 2. Vern. 340.
(b) Latch, 39.

(c) See *Willett v. Sandford*, 1. Vezey, 178. 186.

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are executed (a), and he might compel them to convey accordingly; and therefore they shall pass by this devise, though he had bought other lands which were actually conveyed to him; and this was never made a question in this court before: and as for the objection, that what rests in *articles* was neither *lands* or *money*, this is of no manner of weight, and therefore it deserves no answer (b).

As for the *fee-farm rents*, a devise of "lands" is sufficient to pass such "rents," or any other right out of lands; and therefore where there is such a devise (as in this case) they shall not descend to the heir, especially since it appears on the face of this will, that the testator had devised two hundred pounds a-year to the heir during life; and then in the codicil he takes notice, that his heir had a sufficient provision made for her, and says, that it shall be all which she shall have, and that on condition she should release all farther demands out of his estate both real and personal.

And this codicil is a good *republication* of his will (c). Now as to *republications*, there is some difference between *real estates*, which will not pass without it, and the construction of a devise of *personal estates*, to make them pass without it, which construction is on the statute of Wills (d), which introduces a new method of conveying estates, viz. "That any person having lands may dispose thereof by will;" and this is founded on the reason of the common law, that a man cannot give what he hath not, as the heir in tail cannot grant or release to discontinue the estate-tail. Now admitting that "rents" will pass by a devise of "lands," yet the testator had not those lands to devise, because the time of conveying them was not come. It is true, this objection was made, but it is of no weight, because, as hath been observed already, the vendors are trustees for the purchaser until a conveyance could be made. Besides, a man's mind may change when he grows rich; and since the statute of Frauds, a *republication* must be in writing.

(a) See *Chapman v. Tanner*, 1. Vern. 267. *Walker v. Drefwick*, 2. Vezey, 622. *Pollexfen v. Moor*, 3. Atk. 273. *Fawell v. Helis*, Amb. 724. *Blackburn v. Gregson*, 1. Bro. C. C. 420. *Cater v. Earl Pembroke*, 2. Brown C. C. 284.

(b) If a person article to buy certain lands, he thereby becomes seized thereof in equity, and they will pass by a subsequent devise of "all his lands of inheritance." *Greenhill v. Greenhill*, Prec. in Ch. 320. S. C. 2. Vern. 679. S. C. 1. Eq. Abr. 174. *Green v. Smith*, 2. Atk. 572. And where a man covenants to lay out a sum of money in the purchase of lands, and devises his real estate before he has made such purchase, the money to be laid out will pass to the devisee. See *Green v. Smith*, 1. Atk. 572. *Lingen v. Sowray*, 1. Peer. Wms. 172. *Beauchear v. Mead*,

2. Atk. 169. *Oldham v. Hughes*, 2. Atk. 453. *Pullen v. Ready*, 2. Atk. 590. *Guidot v. Guidot*, 3. Atk. 254. *Pultney v. Earl of Darlington*, 1. Brown C. C. 224. *Rashleigh v. Master*, 3. Brown C. C. 99. *Whitaker v. Whitaker*, 4. Brown C. C. 31. But where A. devised "all his real and personal estate," and afterwards article to purchase lands, and then died, the heir at law was held to be intitled to this estate, as not passing by the will. *Langford v. Pitt*, 2. Peer. Wms. 629. *Allen v. Allen*, Moseley, 262. *Cotton v. Cotton*, 2. Ch. Rep. 138.

(c) *Powell on Devises*, 658. 664.

(d) 32. Hen. 8. c. 1. and 34. & 35. Hen. 8. c. 5.—See also 1. Roll. Abr. 617. *Dyer*, 143. *Plowd.* 344.

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As to the *copyhold estate*, though the testator by his will hath declared only a trust of his *freehold* and *leasehold* estate; so that no trust is raised by the will, yet by the codicil he shews plainly, that it was his intention to pass a trust in them, or to pass them in trust.

* [79]

* As to *the release*, it is true, it is no conveyance, if nothing passed by the will; nor, as this case stands, is it any conveyance to bar the heir at law of any demand to the testator's estate, she being a *feme covert*; but he having declared in the codicil, that she shall have her annuity on condition she releases, &c. this must be intended a release by fine, so that it may be effectual, otherwise she shall quit her annuity.

And this will, as to the *personal estate*, is good and perfect.

THEREFORE IT WAS DECREED, that the original bill should be dismissed with costs, but the defendant forgave the costs.

And as to that part of this cause which related to the widow of the testator, especially as to the two hundred pounds which was devised to her by her father to be laid out in something in memory of him, it ought to be paid out of the personal estate of the testator, it being received by him, and for his own benefit, and the rather, because he was executor to her father; and it is a misbehaviour in him not to perform his will in every respect; but it shall carry no interest, because it was to be laid out in something for his remembrance, which would have been no benefit to her husband, the testator, if laid out in his life-time, because it was not for her separate use, but was to be laid on a special trust, and to a particular purpose (a).

And as for the rest of the widow's demands, the defendant is ready to satisfy her as desired.

Affirmed in the house of lords.

(a) A legacy for mourning carried interest, *Swinfen v. Scawen*, 1. Vezey, 99. ; but not for a sum uncertain, *Ferrers v. Ferrers*, Cases T. T. 2. But for

cases in which the court of chancery will not allow interest, see 2. Com. Dig. "Chancery" (3. S.).

HILARY

HILARY TERM,

The Tenth of George the First,

I N

The Year

1724.

I N

The Court of Chancery.

The Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

* Hobson *against* Staneer.

* [80]

Case 35.

A BILL was exhibited by the plaintiff to be relieved against a bond obtained by the defendant, and, as suggested, without any manner of consideration; and to have another bond of eighty pounds, conditioned to pay forty pounds, to be delivered up to the plaintiff, the money being paid, and likewise to be relieved against a settlement obtained from him by fraud, without consideration, he being a weak man.

If a person upon his marriage make an extravagant or unreasonable settlement, yet if no fraud or incapacity appear, it shall not be avoided by persons claiming under a subsequent marriage settlement.

THE CASE was, That the plaintiff married the daughter of the defendant, who was his first wife, upon which marriage the defendant procured a settlement from him by fraud, which was by settling part of his estate to the use of himself and his said wife, for life, remainder to trustees to preserve contingent remainders, remainder to the use of *Joshua Staneer*, and his heirs, who was the eldest son of the defendant, and brother to the plaintiff's wife, and of other part of his estate to trustees for two hundred years, to pay any money the plaintiff should charge it withal, by way of legacies, or otherwise, remainder to another brother of the plaintiff's wife, and to his heirs for ever. But the defendant, his father, took care to have a grant from him of that power which he had to charge the estate; and his mother-in-law procured another grant

- 1. Ch. Rep. 40.
- 2. Vern. 475.
- 1. Vern. 100.
- 1. Atk. 625.
- 2. Com. Dig. "Chancery"
- (2. T. 15.)

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* [81]

from him of one hundred pounds, to be paid to her after the death of his wife, which was recited to be in consideration of the love and affection * he had for his wife, who was her daughter; and they obtained another bond of him of eighty pounds, conditioned to pay forty pounds, without any manner of consideration; therefore he insisted, that this settlement and both the bonds ought to be set aside; and a second settlement which he made on his now wife, upon his second marriage, and in consideration of her portion, might be established and made good.

The defendant answered, that the plaintiff having married his daughter without his privity or consent, he was at first very much displeased, but afterwards was reconciled, and took him and his wife into his house, and paid some of his (the plaintiff's) debts, and had done other services and kindnesses for him and his wife, so that he (the plaintiff) was indebted to the defendant in the sum of one hundred pounds and more; and that in consideration thereof, and of the love and affection which he did bear to his wife (a), who was now dead, he made the said settlement, which he insisted on to be good, and not to be set aside (b).

The single question upon the proofs was, Whether this settlement shall be set aside, either for want of capacity in the plaintiff, or for that it was a voluntary settlement (c)?

And as to that IT WAS ARGUED *for the defendant*, that the witnesses for the plaintiff had not shewn one single instance of his weakness, but generally, that he was a weak man; when the witnesses produced by the defendant prove, that he was a person sufficient to manage his own business and estate; and certainly it is not necessary, that every man who makes a settlement should be an ingenious or a learned man, for it is sufficient if he is of an ordinary capacity; therefore this settlement ought not to be set aside for any *incapacity* in the plaintiff.

Neither ought it to be set aside as a *voluntary settlement* to make room for another upon the plaintiff's second marriage, because the second settlement was obtained upon no better consideration than the first (d), which was had without any manner of fraud or circumvention; and so far from it, that it was proved the plaintiff always intended, if he had no issue, that his estate should go to the relations of his wife; and that such his intent continued even after the death of his wife.

(a) *Stiles v. Attorney General*, 2. Atk. 152.

(b) That equity will not carry an agreement into execution without a valuable or meritorious consideration, see *Colmay v. Sorrell*, 3. Brown s C. C. 12.

(c) See *Goodwin v. Goodwin*, 1. Ch. Rep. 173. *Vickers v. Bramont*, 1. Vern.

100. *Clavering v. Clavering*, 2. Vern. 473. *Taylor v. Jones*, 2. Atk. 601.

Watson v. Routledge, Cowp. 705.

(d) *Allen v. Arme*, 1. Vern. 365.

Clavering v. Clavering, 2. Vern. 473.

Young v. Cottle, 1. Peer. Wms. 102.

Hawes v. Wyatt, 3. Brown C. C. 156.

But

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But if the Court should be of opinion, that this is a voluntary settlement, yet the bill ought to be dismissed for want of proper parties, because *Robert Hobson*, the plaintiff's father, who had the legal estate by the last settlement, is not made a party; besides, the plaintiff shall not have any * remedy to set aside the first, and to set up the last settlement, because he has the same estate in both; therefore he can have no pretence to complain in a court of equity for relief against one settlement in favour of another; such an application as this ought to be made by him who is aggrieved, and who hath an estate by one settlement and none by the other.

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* [82]

Therefore it was insisted, that the first settlement was made on a good consideration, for what can be better than marriage? and the remainders limited on the same consideration are good.

As for the bond of eighty pounds, the defendant insists, that he paid the money for the plaintiff's use at two payments, &c.

ON THE OTHER SIDE it was argued, that this was a very extravagant settlement; in the first place, because there was no manner of provision for the issue of that marriage; and though there was an estate limited to trustees to preserve contingent remainders, yet there are no remainders in the settlement; but the inheritance of all his (the plaintiff's) lands is settled on *Joshua Staneer*, his wife's brother; and in consideration of love to his wife; for after the limitation to him (the plaintiff) and his wife for life, the remainder in fee of part of the estate is immediately limited to one of her brothers, and the fee of the other part of the estate is limited to another of her brothers, with an intermediate term of years to trustees, which the plaintiff might charge; but care was taken to have a grant of that power which the plaintiff had to charge the lands, from the plaintiff to that brother, so that after all events he might be in as good a condition as his elder brother.

Besides, this estate being no more than fifty pounds a-year, and the plaintiff but tenant for life, there are other incumbrances set up by the defendant, viz. a grant of one hundred pounds to the defendant's wife at five pounds *per cent.* during her life, and the bond of eighty pounds, which is impossible for him to pay, having only an estate for life in such a small estate; and this shews an apparent fraud on the face of the deed itself; and by this means the defendant will always have the plaintiff in his power to get any other writing from him to charge his estate.

As to the objection, that this second settlement was made upon no better a consideration than the first, the fact is quite otherwise, for it was made not only in consideration of marriage, but of one hundred pounds, which the plaintiff actually received as a marriage-portion with his wife.

* But upon reading the settlement, it appeared to be thus:

* [83]

The estate was limited to *Robert Hobson* the father of the plaintiff, his heirs and assigns, during the lives of the plaintiff and his wife,

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in

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in trust that he might employ the profits for the maintenance of the said plaintiff and his wife during their lives, with remainders to the issue of that marriage with other remainders over, so that the plaintiff had no estate by this second settlement.

THE COURT. The plaintiff has no reason to complain, because it appears he is in a better condition by the first settlement than by the last, for he has an estate for life by the first, and none by the last. And there being no fraud proved in obtaining the first settlement, nor any manner of proof of the plaintiff's incapacity, there can be no reason to set aside the first settlement.

But *Robert Hobson*, the plaintiff's father, who had the legal estate by the second settlement, not being made a party to the bill, the plaintiff could have no decree, but had leave to amend his bill, &c.

Case 36. *Evans against Hoskins, and the City of Gloucester.*

If a lease for years, worth 200l. a-year, belong to two coparceners, and one of them, upon a false suggestion that a fine of 250l. was to be paid for the renewal of it, obtain an assignment of the other's moiety for a consideration of 20l. equity will set aside this conveyance as fraudulent, and order the assignee to account for a moiety of the profits.

* [84]

S. C. 2. Eq. Abr. 88.

Ante, 80.

1. Vern. 206.

2. Vern. 307.

1. Atk. 499.

2. Atk. 254.

2. Brown C. C. 150.

1. Com. Dig.

"Chancery"

(2. T. 11.)

LADY JOAN COOK, by licence from *King Henry the Eighth*, granted the lands in question to the mayor and burgesses of *Gloucester*, in trust that whenever the lease made by her to one *Partridge* and *Anne* his wife should be determined, they would make a new lease to them, or to the heirs of the said *Anne* at any time on request, on payment of twenty marks, and under the yearly rent of twenty marks for the space of thirty-one years, and with such clauses and conditions as in the old lease; and that upon the expiration of such lease of thirty-one years, the defendants, the mayor and burgesses of *Gloucester*, should at any time, on the request of the heirs of the said *Anne*, make a new lease to them in manner as aforesaid.

The plaintiff *Evans*, and one *Holeman Hoskins*, who was the father of the defendant *Hoskins*, were coheirs of the said *Anne Partridge*, and he the said *Holeman Hoskins*, in the year 1712, got an assignment from the said *Evans* of his right without any manner of consideration; therefore this bill was brought against the defendant *Hoskins*, the son of the said *Holeman Hoskins*, to set aside the said assignment as obtained by fraud and imposition on the plaintiff *Evans*, by misinforming * him of the state of his right, and against the other defendants, the mayor and burgesses of *Gloucester*, to have a lease made to the plaintiff *Evans*, and to the defendant *Hoskins*, as coheirs to the said *Anne Partridge*, and according to the covenants in the original lease granted by the *Lady Cook* to the mayor and burgesses of *Gloucester*.

The defendants by their answer acknowledge, that the plaintiff and the defendant *Hoskins* are coheirs to the said *Anne Partridge*, and that the *Lady Cook* made such a grant to the mayor and burgesses of *Gloucester* as in the bill is set forth, and that leases have since been made of those lands, pursuant to the covenants in the original lease. But that in the year 1712, the plaintiff *Evans*, in consideration

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consideration of eighty pounds paid to him by *Holeman Hoskins*, the defendant *Hoskins's* father, assigned all his right in the lease to him the said *Holeman Hoskins*; and by another deed covenanted that the said *Holeman Hoskins* might make use of his (the plaintiff's) name in taking a new lease of the city, &c. and that his name might be put in the said new lease, in trust for the defendant *Hoskins*; and that on producing the said deed, the city made a new lease to the said *Holeman Hoskins*, without naming the plaintiff, but denies any fraud in obtaining the said lease.

The mayor and burgesses of *Gloucester* likewise own the pedigree, the grant, and the trust, as set forth in the bill; and that on shewing them AN ASSIGNMENT, made by the plaintiff *Evans*, of all his right, they made a new lease to the said *Holeman Hoskins*, according to the covenants in the original lease.

This being the case, THOSE WHO ARGUED for the plaintiff insisted, that leases had been made from time to time according to the covenants and clauses in the original lease, and that the last lease granted to *Holeman Hoskins* was in the year 1690, and that the said *Holeman* in the year 1712, made application to the plaintiff *Evans*, who was a stranger to this covenant, and informed him, that the city insisted on two hundred and fifty pounds fine, and on a considerable advancement of the rent; whereupon the plaintiff *Evans* being thus misinformed, and not knowing but the lease in being would soon expire, executed this assignment in consideration of twenty pounds to him paid by the said *Holeman Hoskins*, and no more. It is true, the defendant *Hoskins*, who is executor of the said *Holeman Hoskins*, pretends that this assignment was made in consideration of eighty pounds paid to the plaintiff *Evans*, which * he denies: but admitting it was so, it is a very small consideration for the purchase of such a lease, the lands being worth above two hundred pounds a-year; besides, at the time of this assignment, there were twelve years of the old lease unexpired; so that a fraud appears upon the very face of the deed itself (a). Therefore it was insisted, that the said assignment should be set aside, and a new lease decreed to the plaintiff *Evans*; and that the defendant, as executor to *Holeman Hoskins*, may account to the plaintiff for the profits of the lease received by his father *Holeman Hoskins* in his life-time, and by him the defendant since his father's death.

* [85]

On reading the proofs, it appeared, that there was no more than twenty pounds paid to the plaintiff as a consideration of his assigning his right in the lease to the said *Holeman Hoskins*; and that the benefit thereof was worth more to him than two hundred pounds a-year, and that twelve years of the old lease were unexpired at the time when he (the plaintiff) executed this assignment; and it

(a) *Cory v. Cory*, 1. Vezey, 19. *Kinchant*, 1. Brown C. C. 369. 374.
Oldin v. Sambourne, 2. Atk. 15. *Young* *Evans v. Llwllyn*, 2. Brown C. C. 150.
v. Peachey, 2. Atk. 255. *Kinchant* 7.

appeared

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appeared by a letter which was proved to be written by the said *Holeman Hoskins*, purporting that he and the plaintiff were to pay two hundred and fifty pounds to the city, for a fine on renewing the lease, when they were to pay only twenty marks, and no more.

And all that the defendant proved was, that the lands were not of so great a value at the time of the assignment as they were now, and that the city insisted on one hundred and fifty pounds for a fine: which is very true; but the reason was, because *Holeman Hoskins* would have a lease made to him exclusive of the plaintiff *Evans*.

Whereupon THE COURT decreed, that this assignment should be set aside, and a new lease to be made to the plaintiff, and to the heirs of *Holeman Hoskins*, according to the covenant in the original indenture made between the *Lady Joan Cook* and the city of *Gloucester*: and that the defendant, the executor of *Holeman Hoskins*, shall account for a moiety of the profits during the said *Holeman's* life, and since his death, and shall pay the costs of this suit.

* [86]

Cafe 37.

* *Hosier against Read.*

Where an agreement by parol, but confessed in the answer, shall be executed, though not in writing.

Eq. Abr. 19.
2. Com. Dig.
"Chancery"
(2. C. 4.).
2. Bro. C. R.
559.

THE PLAINTIFF exhibited this bill to have the defendant execute such a lease as the Court should direct.

The case, upon the pleadings, was thus:

There was an agreement in writing executed between the plaintiff and the defendant, by which the defendant was obliged to take a lease of a farm of the plaintiff for nine years, at the yearly rent of one hundred and forty pounds, and at the time of executing the said agreement, the defendant averred, that he had a lease of the great tithes of the parish of *Calverton*, and promised to manure this farm with the straw of the said tithes when made into dung; that by virtue of this agreement, the defendant entered and ploughed some pasture ground, and grubbed up some bushes contrary to the said agreement; for which ploughing and grubbing the plaintiff demands satisfaction, and that the defendant might execute a lease according to the said agreement (a): That there was a meeting between them to execute a lease, but then the defendant insisted upon some extraordinary conditions not in the written agreement; and that what chiefly induced the plaintiff to enter into this agreement, was the promise of the defendant to manure the lands with the straw as aforesaid.

(a) That where a man takes possession in pursuance of an agreement, the Court will decree execution of it, see *Clerk v. Wright*, 1. Atk. 12. *Earl of Aylesbury's Case*, Stra. 783. *Lacen v. Mertins*,

3. Atk. 4. *Butcher v. Stapeley*, 1. Vern. 363. *Lockey v. Lockey*, Prec. Ch. 519. *Walker v. Walker*, 2. Atk. 100. *Gunter v. Halfey*, Amb. 586. *Whitbread v. Brockhurst*, 1. Brown C. C. 404. 417.

The

Hilary Term, 10. Geo. 1. In Chancery.

The defendant by his answer confessed, that he agreed to take a lease of this farm, by which agreement the plaintiff was to repair the house, and outhouses, and to build a new dairy-house, and to sink a well; and that the defendant was to have liberty to plough up *some* closes, and to grub bushes in others, which was in consideration of ten pounds a-year advance of rent; and that according to this agreement, he is willing and ready to execute a lease, and says that the written agreement on which the plaintiff insists is no more than a memorandum drawn by an attorney, and that the defendant had agreed to take a lease of the farm for such a term, and under such a rent, that the plaintiff agreed to let the defendant have the possession, for that *Lady-day* was near at hand, and until he; the plaintiff, should be satisfied that a clause in the lease, on which the defendant insisted, was usual to be inserted in leases there, which clause was, that the defendant was to covenant to leave the premises in good repair, the accidents by fire and tempest only excepted, and unless that * clause was inserted in the lease, the defendant refused to sign it.

HOBBS
against
REAR,

* [87]

But the plaintiff insisting to have a lease executed according to the agreement in writing, and the defendant refusing it for the reason before mentioned, the plaintiff exhibited his bill to enforce the execution of such lease.

Thereupon the defendant exhibited a cross-bill, in which he set forth the agreement at large, as before in his answer to the original bill, and insisted, that the plaintiff might execute a lease according to that agreement, which he was ready to execute on his part.

To which cross-bill the plaintiff made answer, by which he confessed, that by the first agreement he was to put the houses in repair, and to make a new dairy, and to sink a well; but that all this was to be done upon a supposition that the now plaintiff had a lease of the said tithes, as he affirmed, and would manure the farm with the straw thereof; but denies that the plaintiff had any leave to grub up bushes in consideration of advance of rent, for that ten pounds a-year advance is no manner of consideration, the farm being very well worth one hundred and forty pounds, and so much the former tenant paid; but insists on a lease in pursuance of the *written agreement*; and that there was no clause therein by which liberty was given to grub any bushes in consideration of advance of rent.

There were two questions upon these bills, answers, and proofs.

THE FIRST was, If the plaintiff in the original bill shall have a lease according to the written agreement, or memorandum in writing?

SECONDLY, If he shall be obliged to execute a lease to the defendant, according to the agreement set forth in the answer to the cross-bill, which was not in writing, that being lost?

As

Hilary Term, 10. Geo. 1. In Chancery.

HOSIER
against
READ.

As to this matter, the case is thus :

One *Thompson*, an attorney, drew some heads of an agreement between the plaintiff and the defendant, which heads were now lost ; but this attorney, who was chosen by both parties, made oath, that the purport of them was according to the agreement set forth in the answers, both to the original and cross-bills ; and that in the lease of the former tenant there was a clause to repair, but fire and tempest were excepted, and that it is an usual exception in leases there.

[88]

* It was likewise in proof, that when the parties met to execute a lease, there was no objection made by the plaintiff but only to that exception, and that the written agreement was no more than a memorandum, that the defendant being likely to be out of the farm he then held, and *Lady-day* coming on, it was thought convenient he should have some place to enter with his stock till the plaintiff should be satisfied whether such a clause was usual in leases.

It is true, this memorandum refers to the first agreement, but the plaintiff in his answer to the cross-bill confesses, that he agreed to most of the clauses, but that it was upon other considerations, as he would now insinuate.

In the case of *Jones v. Sheriffe*, there were heads of an intended lease taken by an attorney in writing ; but upon proof that some other clauses were agreed on between the parties at the same time, this Court decreed, that those clauses should be put into the lease, notwithstanding the Counsel on the other side strenuously insisted on the statute of Frauds.

So in case of absolute mortgages (which was the old way of mortgaging estates) with a promise by the mortgagee to make a defeasance, which he afterwards denied to make, and insisted, that since the statute of Frauds, 29. Car. 2. c. 3. he was not obliged to do, because not in writing ; but on the hardship of the case, and on the fraud, the Court decreed a defeasance.

ON THE OTHER SIDE *it was argued*, that it would be of dangerous consequence to admit this parol and pretended agreement to be given in evidence directly against this written agreement ; this is a thing which could not be done before the statute of Frauds, much less since that statute was made (a). Besides, this parol agreement is inconsistent in its very nature, it being for leave to cut bushes in a country where fuel is very scarce, and where many young oaks are preserved by those bushes whilst growing ; and therefore it was insisted to have a lease executed according to the written agreement.

(a) *Partridge v. Powlet*, 2. Atk. 383.
Lake v. Phillips, 1. Ch. Rep. 110.
Irnham v. Child, 1. Brown C. C. 92.

Patmore v. Morris, 2. Brown C. C. 219.
Hare v. Sherwood, 3. Brown C. C. 163.
Jordan v. Sawkins, 3. Brown C. C. 358.

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The agreement being in writing, THE COURT was of opinion not to make any decree against it upon a parol agreement (a).

HOSIER
against
READ.

But THE COUNSEL for the defendant insisting, that it did not stand on the foot of a parol agreement, because it was confessed in the answer to the cross-bill (b); and it being fully proved by the attorney who drew it, and no objections being * made to it but as
afore said ;

* [89]

THE COURT, upon the reading the proof of the second writing or memorandum, and finding it referred to the first agreement, dismissed both the bills, but without costs.

(a) 2. Chan. Cases, 142.

(b) But see *Whitchurch v. Bevis*, 2. Brown C. C. 559.

Scurry and his Wife against Morfe.

Case 38.

THIS was a bill brought by the plaintiff and his wife, who was the widow of *Henry Bodily*, to have an account of the personal estate of the said *Henry*, and to be repaid some costs the defendant put them unto, by unnecessary suits at law.

A person cannot bring a bill in equity for an account against one co-executor only, either as a creditor or as residuary legatee.

The bill sets forth, that the plaintiff *Scurry* was executrix of the said *Henry Bodily*, her first husband, who likewise constituted the defendant *Morfe*, and another, as co-executors in trust for his widow, the now plaintiff, in order to assist her to recover the personal estate; but that the defendant *Morfe* now insists to act as executor alone; and farther, that the testator, *Henry Bodily*, her first husband, sued the executors of *Henry Bodily* the elder, but died before the said suit was ended; and thereupon this defendant *Morfe* prosecuted that suit to an account before A MASTER, but then released it; and therefore the plaintiffs now insist, that the defendant shall account (a), or that the account taken before the master may be inspected.

S. C. 2. Eq. Abr. 168. 252.
2. Peer. Wms. 308.
Co. Lit. 113. notis.
3. Peer. Wms. 33. 331.
Mitford Pleadings, 144. 146. 220.

The defendant by his answer says, that he hath done nothing but as executor to the testator *Henry Bodily*, and in trust for his children, and that this suit ought not to be carried on against him alone, who is but one of the three co-executors, so that there are not proper parties before the Court.

IT WAS ARGUED for the plaintiff, that though there were three co-executors, yet the plaintiff might release one, and demand an account against the other of such part of the testator's goods as came to his hands, which demand was now made of the defendant, who was only a trustee for the plaintiff.

THE COURT was of opinion, that the plaintiffs could not sue, as creditors, one executor without the other, nor as residuary legatee.

So the bill was dismissed for want of proper parties (c).

(a) 2. Eq. Abr. 6.

50. S. C. 3. Atk. 341. Plunket v.

(c) See *Ashhurst v. Eyre*, 2. Atk.

Pynson, 2. Atk. 51.

Dawson

Cafe 39.

* Dawson against Chater.

The court of chancery will not make a decree on a bill for a legacy by a devise against an heir at law, who controverts the validity of the will, until after an action at law.

AN ESTATE was devised to T. P. who exhibited this bill against the heir at law, to have the possession thereof according to the will of the testator.

The defendant, by his answer, denied the making any such will as in the bill is set forth; but that if any such was made, it was obtained by the plaintiff by circumvention and fraud, when the testator was *in extremis*, and not of a sufficient capacity, or disposing memory.

S. C. 2. Eq. Abr. 500.
10. Mod. 15.
2. Com. Dig. "Chancery" (X.).

THE COURT was of opinion, that it would be to no purpose to proceed in the hearing this cause, for that it was a positive rule, that where there is any doubt on the proofs, a will shall not be established against an heir without a trial at law; therefore if a decree should be made against the heir, it would be reversed in the house of lords for that reason. As to this matter *Lord Montague's Case* (a) is full in point, to whom very great legacies were given, and he was made sole executor of the will, which he proved in *Doctors Commons*, and received the legacies; but afterwards exhibited a bill in this court as heir at law to the testator against the defendants, to whom the estate was devised; suggesting that he (the testator) was *non compos mentis* at the time of making the will. And LORD COWPER, who was then Chancellor, considering this will was contested by him who swore to the truth thereof, and profited under it, decreed against him:

But the decree was reversed in the house of lords; where IT WAS RESOLVED, that no decree against an heir at law shall establish a will without a trial at law, if the heir insists on it, especially where there are any lands devised (b).

(a) 6. Bro. P. C. 232.

2. Com. Dig. 316. See the trial at law in this case, 10. Mod. 15.

(b) Resolved accordingly in the case of Cook v. Parsons, 6 February, 13. Will. 3.

Cafe 40.

Hack against Leonard.

If a lessor recover possession at law, on a breach of covenant for non-repair, equity will relieve the lessee on his paying the damages occasioned by not repairing, although the lease was conditioned to be void on non-performance of the covenants.—S. C. 2. Eq. Abr. 161. Ante, 22. Post. 113. 3. Ch. Rep. 54. 135. 1. Vern. 83. 450. 456. Ch. Cases, 144. 1. Ch. Rep. 170. 161. 2. Vern. 222. 594. 2. Vent. 352. 2. Peer. Wms. 424. 2. Com. Dig. "Chancery" (2. Q. 3.). 4. Vin. Abr. 406. pl. 34. 2. Atk. 238.

A BILL was brought against an administrator to have a new lease granted for the residue of the term granted by the intestate.

THE CASE was thus:—An ejectment was brought by the intestate, upon a lease for years made by him to the lessee, rendering rent, with a clause of re-entry for non-payment of the rent, and for non-performance of the covenants, which on the part * of the

lessee

Hilary Term, 10. Geo. 1. In Chancery.

lessee were to be paid and performed, and the breach was assigned generally for non-performance of the covenants in the lease. Thereupon the agent for the lessee asked the lessor what rent was due to him, and that it should be paid; who replied, he would not trouble himself about the rent, but would set aside the lease. The defendant being prepared to prove a tender of the rent, pleaded performance generally; upon which they were at issue; and at the trial, the defendant offering to prove the tender, the plaintiff did not insist upon the non-payment of rent, but proved a breach of covenant for not keeping a barn well thatched. Thereupon the plaintiff had a verdict, and the defendant was turned out of possession, and soon afterwards the plaintiff died intestate.

HACK
against
LEONARD.

And now this bill was exhibited against his administrator to be relieved against the said verdict, and to have a new lease granted to the plaintiff for so much of the term of the first lease which was not expired.

THE COURT. If a bond had been given for the performance of covenants in this lease, and had been afterwards put in suit, this Court could not grant any relief against it (a).

But THE LORD CHANCELLOR said, he could not apprehend what damage the administrator could sustain, if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten, and left all in good repair before the end of the term.

Therefore it was referred to A MASTER to see what damage was done, if any, for non-performance of covenants, and at what time, &c. (b).

(a) *Wafer v. Mocatto*, post. 113.
Ray v. Duke of Beaufort, 2. Atk. 190.
Benson v. Gibson, 3. Atk. 395. *Sloman*
v. Walter, 1. Brown C. C. 418.

(b) See *Taylor v. Knight*, 4. Vin,
Abr. 466, 467.

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E A S T E R T E R M,

The Tenth of George the First,

I N

The Year

1724,

I N

The Court of Chancery.

* Carpenter *against* Chapman.

Friday, 24 April.

* [92]

Cafe 41.

LANDS were devised by a father to his two daughters to augment their portions.

Devise by a father to his two daughters, carries a fee-simple.

The question was, What estate the daughters should have in the lands so devised ?

Those who argued, that they had not the inheritance, relied upon a case in 1. *Roll. Abr.* 833. where the father devised his estate to his son and daughter "equally to be divided (a)," and it was adjudged an estate for life only in the daughter, there being no words either in that will or this to pass the inheritance.

1. *Roll. Abr.* 834.
Moor, 57.
Carter, 232.
6. *Mod.* 110.
Stra. 798.
2. *Atk.* 71.

PARKER, *Lord Chancellor*, decreed, that the daughters took the inheritance; for no other estate could be esteemed in augmentation of their portions (b); as a devise of land to J. S. "paying ten pounds," carries a fee-simple (c), though ten pounds is not the hundredth part of the value of the land; and the reason is, because otherwise the devisee might be a loser; as if he paid the ten pounds and died immediately after: so if a man devise a thousand

(a) Moor, 594. 1. *Vern.* 65. Amb. 93. Bagshaw v. Spencer, 2. *Atk.* 578. Oates v. Markham, 3. *Burr.* 1684.
2. *Bl. Rep.* 1215. 3. *Com. Dig.* "Devise" (N. 7.).
(b) Wright v. Pearson, Amb. 362. Cro. Eliz. 204. Cro. Jac. 591. 599.
Villers v. Villers, 2. *Atk.* 72. Gibson v. Mountfort, 1. *Vezey*, 491. S. C.
(c) 2. *Mod.* 25. 2. *Vern.* 106.
3. *Com. Dig.* "Devise" (N. 4.).

Easter Term, 10. Geo. 1. In Chancery.

CARPENTER *against* CHAPMAN. pounds to be laid out in a purchase of lands to be settled on his son, his son will be intitled to the fee-simple of those lands, as has been lately decreed.

* [93]

Cafe 42.

* Burdett *against* Young.

If a devise be "to my wife all my personal estate of what nature or kind the same may be, to her sole use during her natural life. *ITEM*, I bequeath to my grandson A. and my grand-daughter B. one thousand pounds a-piece, if they attain the age of twenty-one or shall be married, but if they die before that age, then, &c."

THOMAS SUTTON by his last will devised all his real estate (which was one hundred and thirty-five pounds a-year) to his wife for life, and after her death to two trustees to charitable uses; then he gave the use of all his personal estate whatsoever to his wife for life; then gave two thousand pounds to his two grand-children, to each one thousand pounds, payable at their age of twenty-one, or day of marriage; and if they died before such age or marriage, to charitable uses. Then he gave four pounds to his servants; ten pounds for mourning to several persons; two guineas for a funeral sermon; and directed a hundred pounds to be expended in his funeral and tomb-stone, and by a subsequent clause disposed of some of his household goods after his wife's death (a).

He died; and the complainant, one of his grand-children, being arrived to the age of twenty-one, brought his bill against the wife to compel an immediate payment of his part of the two thousand pounds legacy.

The question was, Whether the two thousand pounds legacy is payable at the age of twenty-one, or marriage; or, Whether the wife shall enjoy it for her life?

TALBOT *for the plaintiff*.

ROBINS *for the defendant*.

The defendant insisted by her answer, that *Thomas Sutton*, the testator, was a freeman of the city of *London*, and could dispose a moiety only of his estate, and no more (b); and that the other moiety thereof belonged to her (this defendant) by virtue of the custom of *London*, and likewise her *paraphernalia*; and she insists likewise, that the testator having devised to the plaintiff several specific legacies to be paid after her death, and having devised his personal estate to her, that this thousand pounds ought not to be paid during her life, nor any security to be given for the household goods.

At the hearing this cause, there was no other proof to shew, that *Thomas Sutton*, the testator, was a freeman of *London*, but

S. C. 8. Viner, 284. 403. 418. S. C. 2. Eq. Ab. 557. 560. S. C. 3. Bro. P. C. 45. Post. 254. Dyer, 59. 2. Vent 342. 366. 2. Vern. 395. 1. Ch. Rep. 112. Skin. 147. 2. Com. Dig. "Chancery" (3. Y. S.). 2. Brown C. C. 305.

(a) See the will more at large, 3. Brown P. C. 45.

(b) See 11. Geo. 1. c. 18. s. 17. ante, page . Notis.

that

Easter Term, 10. Geo. 1. In Chancery.

that one *Thomas Sutton* was admitted to his freedom in such a year, but it did not appear to be the same person (a).

BURDITT
against
YOUNG.

Then the different penning this will as to the specific legacies, and this thousand pounds, shew, that the testator intended the thousand pounds should be paid immediately, and not wait until the death of the defendant: the words of the will were, "ITEM, I give all my personal estate to my wife, and to both my grandchildren a thousand pounds a-piece, if they arrive at the age of twenty-one years, or marriage;" which last clause controls the first devise of the personal estate to the defendant, and makes the subsequent disposition of the thousand pounds a-piece to his grand-children good; so that these legacies ought to be paid immediately after the contingency happened, and likewise security ought to be given immediately for those specific legacies which are to be paid after the defendant's death.

PARKER, Lord Chancellor. The question is, Whether the devise to the wife is to be considered as an absolute devise of the whole personal estate, or only of so much thereof as should remain undisposed of? All the devises must either take effect immediately, or wait until the wife's decease; there can be no difference in the construction of them. The construction of the words, "all my personal estate," has always been limited and confined to such part only as shall not be otherwise disposed of; it is an absurd interpretation of the intent of the devisor to suppose that he intended the devises of ten pounds mourning, &c. should expect his wife's decease. This devise therefore of the two thousand pounds is a present devise (b); and payable as the children attain their ages of twenty-one years, or day of marriage:

Wherefore he made a decree accordingly.

(a) On the 3d November 1722, *PRICE, Baron*, before whom this cause came on in the absence of the Chancellor, was of opinion, that the said entry was not a sufficient evidence to prove the said *Thomas Sutton* to have been a freeman of the city of London, without proving at the same time the identity of the person, and that the said *Thomas Sutton*, the testator, was the same *Thomas Sutton* who was meant and intended by the said entry; and therefore made no decree in relation thereto; but the defendant conceiving herself aggrieved in regard that the said entry in the chamberlain of London's book was sufficient evidence to prove the freedom of the said *Thomas Sutton*, preferred a petition of appeal to **LORD MACCLESFIELD, Chancellor**, who made a decree variant from that of *PRICE, Baron*, but without noticing this point of the case; and on an appeal to the house of lords it was contended, that the entry in the chamberlain of London's book was sufficient

evidence to prove the freedom, and as there was no dispute concerning the identity of the person meant and intended by that entry, the same ought not to have been made a question by the Court; or at least it was a sufficient foundation for the Court to have directed an issue to try the fact, in which any defect, in point of proof, might have been supplied as to the circumstances of the identity; or the same might have been directed to be inquired into by the master. But the decree made by *Mr. Baron PRICE* was fully established. S. C. 3. Brown P. C. 49.

(b) See *Clobberie's Case*, 2. Vent. 342. 366. S. C. 1. Eq. Abr. 294, 295. *Adams v. Clerk*, post. 154. *Bateman v. Roach*, post. 104. *Dame Latimer's Case*, Dyer, 59. b. *Yates v. Fettyplace*, 2. Vern. 416. *Franklyn v. Green*, 2. Vern. 137. *Collins v. Metcalf*, 1. Vern. 462. *Green v. Figgott*, 1. Brown C. C. 103. *Walcot v. Hall*, 2. Brown C. C. 306.

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BURDETT
against
YOUNG.

NOTE, This cause was formerly heard before MR. BARON PRICE, who sat for the Lord Chancellor, and decreed that the children were not intitled to the two thousand pounds till the wife's death (a).

(a) MR. BARON PRICE decreed, that the two grand-children were not entitled to have their legacies paid until after the death of the testator's wife; but that they were in the mean time intitled to have security for the payment thereof on her death, and were also immediately intitled to have an appraisement and account of the plat, linen, and household goods, and to have security that the same should be forth-coming after the death of the tenant for life, and that the grand-children should have the costs of suit out of the testator's estate. And upon an appeal from LORD MACCLESFIELD's decree to

the house of lords, it was ordered and adjudged, that such part of the decree of MR. BARON PRICE as ordered the grand-children their costs of suit, should be reversed; but that the said decree, as to all other parts thereof, should be affirmed, and the decree of LORD MACCLESFIELD, so far as it varied from the decree of MR. BARON PRICE, reversed. S. C. 3. Brown P. C. 50. — See Palmer v. Mason, 1. Atk. 505. Heath v. Perry, 3. Atk. 101. Loder v. Loder, 2. Vezey, 526. See Mr. Cox's Note, 2. Peer. Wms. 612.

* [94]

Case 43.

* Bow against Smith.

Commissioners of sewers made a wrong assessment, and the plaintiff by their warrant d.f. trained; the Court would not relieve.

S. C. 2. Eq. Ab. 206.
Bunb. 61.

THE COMMISSIONERS OF SEWERS assessed all the lands from such a place to such a place in THE LEVEL, to raise money to build a new sluice, and by warrant, directed to the plaintiff, appointed him to collect the money of the owners and occupiers of the said lands, who by virtue thereof made several distresses, and levied money of the defendant's tenants, for which he brought several actions (against the now plaintiff) in their names; and the said assessment being not strictly legal, because it should be assessed on every particular tenant proportionable to the damage he might sustain, therefore the warrants and distresses were not good, and so the plaintiff could not defend himself at law, but a verdict passed against him.

And thereupon he exhibited his bill to supersede those actions, suggesting this matter, and that the said actions were vexatious.

The defendant insists, that the commissioners had no power to tax him, for that there was an old sluice near the place where the new one was intended to be built, which was sufficient to secure all THE LEVEL; and that the new sluice, when built, would be of no manner of advantage to him, and consequently he ought not to be contributory to the charge of building it; and therefore that both he and his tenants had good right to bring actions for the money extorted from him.

* [95]

* THE LORD CHANCELLOR would not help in this case, for if he did, then the orders of commissioners of sewers, and of the sessions, would be made in this court. Now, here the assessment was wrong, and money was levied by virtue of such a wrongful assessment, which ought to be refunded, and a new assessment made; and

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and the right way of making it is to assess the particular lands, according to the danger they lie in; and that it is not necessary to name the owners or occupiers of such lands, for the commissioners may not know them; for if not naming the owners should make the assessment void, there would be an end of all assessments by commissioners of sewers; therefore, if that was the fact, it might be proper for this Court to interpose.

Bow
against
SMITH.

The Lord Coningsby's Case.

Case 44.

THE PLAINTIFF exhibited a bill in THE DUTCHY COURT for several lands, &c. reciting some acts of parliament, and setting forth several patents and grants from the crown, and from thence derived a title to himself of those lands within THE DUTCHY.

If a bill in equity brought in the Dutchy Court to recover lands granted by the crown, omit to aver that the lands lie within the limits of the Dutchy, it is good cause of demurrer.

The defendants demur to the bill, because the plaintiff did not expressly aver the lands to be within THE DUTCHY, but only by inference.

S. C. 2. Eq. Ab. 77.
2. Peer. Wms. 299.

This demurrer was argued before the LORD LETCHMERE, Chancellor of the Dutchy Court, and before the Lord Chief Justice KING, Baron PAGE, and MR. REEVES, assistants, and they delivered their opinions *seriatim*, in which THEY ALL AGREED, that THE DUTCHY was a circumscribed jurisdiction, and that in all such jurisdictions, the plaintiff in his bill or declaration ought to shew, that the cause did arise within the jurisdiction (a), otherwise the defendant may take advantage of it by demurrer. That in courts of general jurisdiction, as THE COURT OF EXCHEQUER or KING'S BENCH, though universal as to the right, yet because circumscribed or limited as to persons, such averments must be made; though where the jurisdiction is general, such allegation is not traversable, as it is in a circumscribed jurisdiction; therefore the plaintiff should have positively averred these lands were within THE DUTCHY, otherwise he cannot maintain this bill.

(a) 1. Saund. 74. 1. Vent. 243. Stra. 827. Ld. Ray. 1555. 1. Term 1. Sid. 87. 1. Lev. 50. 137. 2. Jones, Rep. 151. 230. 6. Mod. 224. 2. Will. 16.

* Osborn against Lea.

* [96]

Case 45.

THIS was A BILL brought by the plaintiff, who was the widow of John Osborn, son of Sir John Osborn, to set aside a mortgage made to one Weeden, who was steward to Sir John Osborn, for that her title was precedent to the title of the mortgagee, it being by articles in marriage, and in consideration of a portion paid, that the lands were settled on her in jointure.

If a mortgagee fraudulently antedate the mortgage deed, for the purpose of over-reaching a marriage settlement, the mortgage is void; but the fact of fraud must be previously tried at law.

The defendant Lea by her answer said, that she was only an assignee of the mortgagee, and did not know that there was any prior

incumbrance;

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OSBORN
against
L.T.A.

incumbrance; and the other defendant *Weeden* says, that he did not know anything of the plaintiff's marriage, at or before the time of the taking the mortgage, which was for twelve hundred pounds, and that he had lent the greatest part of that money to *John Osborn* the mortgagor.

At the hearing this cause,

IT WAS INSISTED for the plaintiff, that this mortgage was fraudulent against the plaintiff.

FIRST, Because it is very likely that the mortgagee, who was a steward in the family, must know that there was a treaty of marriage between *John Osborn* and the plaintiff, and that he would not take a mortgage of the lands dated after the articles, by which the said lands were to be settled in jointure; but admitting the mortgage was made to him before he knew anything concerning the marriage, or the articles; yet as soon as ever he knew that there was such a treaty, and that the articles were intended to be executed, he ought to have given notice of his mortgage to the plaintiff, or to those who were concerned for her in the said treaty of marriage; otherwise it is a mere fraud, and she ought now to be relieved, like the case of *Watts v. Treswick* in my LORD COWPER's time, where the heir in tail, knowing his title, became a witness to a mortgage; and because he did not discover his title to the mortgagee, that very mortgage was established in this court; and he was decreed to suffer a common recovery: so in the case of *Haws v. Potts*, where the brother, who was the remainderman in tail, joined in the settlement of a jointure on his brother's wife, he was decreed to confirm the jointure.

[97] ON THE OTHER SIDE it was said, that every case depended on its own circumstances, and that the case of *Watts v. Treswick* was, that the son solicited the lending the money to * his father, and carried the deed of settlement to Counsel, and was a witness to the deed of mortgage; so that he was all this while contriving a fraud on the lender; therefore it was a just decree, that the mortgage should be established against this fraud, and against his title in tail.

But in the principal case it appearing, that this deed of mortgage was dated the eleventh of April 1710, and that the marriage was had in August following, and *Weeden* the mortgagee having made an equivocal answer, that the deed was dated on or about the eleventh of April, and that he had paid the greatest part of the mortgage-money, when it appeared that he had not paid four hundred pounds, part of the twelve hundred pounds, this gave some occasion to suspect him; and thereupon the mortgage-deed was produced in court, dated as aforesaid, viz. the eleventh of April 1710; and some of the officers of the stamp-office attending, they affirmed, that by the stamp on that deed, it could not be made in

the

Easter Term, 10. Geo. 1. In Chancery.

the year 1710, but in the year 1711, or after, because that stamp was not used before that year, viz. before the year 1711: so that there is a strong presumption it was antedated on purpose to overreach the settlement on the plaintiff.

OSBORN
against
LEA.

Thereupon THE CHANCELLOR ordered that matter to be tried at law, and said, that if it was found that the settlement was made before the mortgage, as it was very probable it would, then the defendant *Lea* should have a remedy over against *Weeden* the mortgagee.

But as to THE OTHER POINT, he was of opinion that it would be very hard for a mortgagee to be at the peril of losing his mortgage-money, if he did not give notice of his mortgage to any person whom he knew to treat about the sale, or any settlement of the lands in his mortgage; and that it very much differs from the case where the mortgagee himself helps to carry on such a treaty (a).

(a) See *Hobbs v. Norton*, 1. Vern. 136. *Savage v. Foster*, 9. Mod. 36. *Wilford v. Beezley*, 1. Vezey, 6. *Hobson v. Rhodes*, 2. Vern. 554. *Berresford v. Milward*, Bar. Ch. Rep. 191. 2. Atk. 49. *Draper v. Borlace*, 1. Vern. 370. *Moratta v. Murgatroyd*, 1. Peer. Wms. 393. *Head v. Egerton*, 3. Peer. Wms. 280. *Becket v. Cordley*, 1. Brg. C. C. 357.

MICHAELMAS TERM,

The Eleventh of George the First,

I N

The Year

1724,

I N

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

* [98]

* Smart *against* Taylor.

Case 46.

TWO WOMEN being accessary to the marriage of a third woman to one who was an *ideot*, and who had forty-five pounds a-year in lands of inheritance, and being ordered to attend the Court, stood in contempt, and refused to appear; and being committed, they now petitioned to be discharged; Information against a person for contriving to marry a woman to an idiot.

S. C. 2. Eq. Ab. 584.

But one *Greenwood* being the principal contriver of this marriage, and the friends of the *ideot* having no evidence to impeach it in *Dofors Commons*, nor any evidence against this *Greenwood* but the petitioners, it was insisted, that they should not be discharged without good security to give evidence of this contrivance.

Which THE COURT thought reasonable, and therefore they were ordered to be kept in custody until they give such evidence, or good security for that purpose.

And IT WAS DIRECTED, that the attorney should cause an information to be filed against *Greenwood*, and that the prisoners should remain in custody until they gave evidence against him in like manner.

Floire

Cafe 47.

* Floire against Sidenham.

If a bill in chancery be exhibited by one coheir against another, and the defendant acknowledge the settlement deeds to be in his hands, but pretends that the estate was devised to him, the Court will order him to produce the deeds to the plaintiff previous to the trial.

S. C. 2. Eq. Ab. 377.
S. C. Cafes in Ch. 2.
S. C. 2. Chan. Cafes, 4.
1. Eq. Abr. 36.
2. Com. Dig. "Chancery"
(3. l. 3.).

THE PLAINTIFF exhibited his bill as one of the coheirs of Sir John St. Barb, and claimed a moiety of the estate by virtue of a settlement made by one Henry St. Barb, the grandfather of the plaintiff, and of the now defendant.

The defendant having set up a will made by Sir John in favour of the said defendant, and it being suggested in this bill that the will, if any, was fraudulently obtained,

It was prayed, that the deeds and writings concerning the lands in question might be brought into court; and the rather, because the defendant in his answer owns the settlement as set forth in the bill, and that the plaintiff is one of the coheirs of Sir John; but says, that John St. Barb, the father of Sir John, suffered a common recovery of all or the greatest part of these lands, and declared the uses to Sir John and his heirs, so that he might lawfully devise the same by his will.

And now IT WAS INSISTED for the plaintiff, that the Court would give him an opportunity to inspect the said deeds and writings, as was done in the cases of the *Earls of Suffolk and Ferrers*; and this is but a piece of common justice usually done by this court in favour of an heir; nay, it hath been done in the case of a devisee who is *bares factus*, as particularly in the case of the late *Duke of Newcastle's* will (a); and it ought the rather to be done in the principal case; for though the defendant hath proved this will as executor, yet he says in his answer, that if it should be set aside, there are other wills in being by which the estate is devised to him.

E contra, It is admitted, that the plaintiff is one of the coheirs of Sir John St. Barb, but that he brought his bill in THE EXCHEQUER, suggesting the same matter as by the present bill, and that upon hearing the cause that bill was dismissed; and now he has brought a new bill in this court, and the defendant insists, that if the plaintiff has any right he should try it at law; and he farther insists, that Sir John St. Barb was tenant in tail general, and that he levied a fine of the lands now in question; so that if the common recovery, and the deed to lead the uses thereof, doth not avoid this settlement, the fine will do it effectually; and that the defendant is willing to shew the plaintiff all the settlements of the family, but not all the conveyances, counterparts of leases, and old deeds.

THE COURT. The right of the plaintiff at law cannot be tried without the deeds, and there can be no reason why the plaintiff should contest the will before he knows whether the testator had power to make it, which cannot be known without the settlement

(a) 8. Vinet Abr. 551. pl. 12.

Michaelmas Term, 11. Geo. 1. In Chancery.

FLOTHAM
against
SIDENHAM.

and the deed to lead the uses of the common recovery; for if the plaintiff has any right, it is by virtue of this settlement made by his great-grandfather. And as this contest is between coheirs, where one sets up a will made in his favour, and insists, that he is not obliged to produce the settlement until the will is set aside, certainly that cannot be a reason for not producing it, because the plaintiff has no better a right to see it then, viz. after the will is set aside, than he has now; therefore the best method is, to have the deeds brought before the Court, and that the plaintiff shall be paid the costs of this suit.

Drummond against Sir Matthew Decker.

Case 48.

THE PLAINTIFF *Drummond* persuaded the *Marchioness Venlets* to lay out a considerable sum of money in bank annuities, and she, or the plaintiff by her order, employed the defendant to purchase the same, and furnished him with fifty thousand pounds for that purpose. Accordingly the defendant purchased annuities to that value in the name of the now plaintiff, but in trust for that lady, and assigned part thereof, viz. ten thousand pounds, to her use, who now by her bill demands the rest.

Whether a foreigner who married a subject of England attainted of treason shall forfeit her portion to the king.

S. C. 2. Eq. Ab.
477.
Post: 104.

The defendant *Sir Matthew Decker* confesses the sum demanded to be due to the plaintiff, but says, he hearing she was married to the late *Lord Bolingbroke*, was advised not to pay it without the decree of this Court to indemnify him.

THE ATTORNEY-GENERAL, who was a party, insisted for the king, that if in the progress of this cause any right should appear to be in THE CROWN, that such right might be saved, and submits to the demands, if she gives such proof as shall satisfy the Court that she is not married to any subject of the king of *Great Britain* who is attainted.

* Whereupon her affidavit was read, which was annexed to the * [101] bill, by which it appeared, that she was not married, and there was no proof that she was married; but if she was, IT WAS ARGUED, that the law of *England* should not be the measure of the decree of this Court in such case, but the law of another country, this being a bare trust for a foreigner; and the Court hath always a regard to the laws of other nations: as for instance, of the laws of *Holland* (a), and of the laws of the Plantations (b).

THE COURT. There is no proof made of the marriage of this lady, and therefore there cannot be any contest between the parties as to that matter; if there should, it is probable that some difficult points might arise; for supposing she was married to the *Lord Bolingbroke*, it would then be a question of great importance, whether this money was forfeited or not by his attainder (c);

(a) *Ashcomb's Case*, 1. Chan. Cases, 232.

(b) *Noel v. Robinson*, 2. Vent. 353.

(c) *Savil*, 40. *Jones*, 71. *Noy*, 6.

for

Michaelmas Term, 11. Geo. 1. In Chancery.

DRUMMOND *against*
SIR MATTHEW
DECKER. for since all foreigners are encouraged by act of parliament to place their money in the public funds, it would be very hard that this money should be forfeited; for then the consequence would be, that a lady in *France*, who hath a separate property from her husband in her own personal estate, would, by placing it in the funds pursuant to an act of parliament, be divested of that property, and have it transmitted to her husband by his coming over into *England*, so that he may dispose thereof at his pleasure; or by her being married to a subject of *England*, should vest in him in *France*, or in the king here, upon his attainder before or after marriage.

But as to the defendant *Sir Matthew Decker*, he hath done nothing but what he ought, for he is not to pay the money till secured.

Therefore IT WAS ORDERED, that he should assign the securities to the lady, and pay the rest of the money not laid out in stocks, and that he should have his costs.

* [102]

Cafe 49.

* Theobalds *against* Duffoy.

Tuesday, 17 November.

A possibility of a term is in equity assignable for a good consideration.
S. C. 2. Eq. Ab. 38. 340.
1. Peer. Wms. 572.
3. Peer. Wms. 132.
2. Atk. 420.

AFEME SOLE having a term for five hundred years devised to her for the residue thereof after an estate for life limited to *A.* married an alien; and with her husband, and with privity and consent of her relations, for a valuable consideration, sold the remainder of the term to *J. S.* *A.* dies during the term; then the *feme* with her husband sold the term to *J. N.* who, recovering the same at common law, the first sale being void, *J. S.* the first vendee exhibited his bill for an injunction.

The question in this case was, Whether an assignment of a possibility of a term shall be carried on in equity against a verdict at law, without a sufficient equitable consideration (which in the principal case was but thirty pounds)?

It is plain this assignment would be void at law, according to the sixth resolution in *Lampett's Case* (a); for the devise being of a term for years to the mother for life, remainder to the daughter, &c. this makes it an executory devise, and the sixth resolution in *Lampett's Case* is, that such an executory devise cannot be granted over; therefore if such a grant is void at law, it should not be established in a court of equity.

By **PARKER**, Lord Chancellor. If an estate be granted to *A.* for life; remainder to *B.* for life; this is a certain estate in *B.* and a transferable interest, though he may die in the life-time of *A.*; but if an estate for years be granted to *A.* for life, and a grant to *B.* that he shall have and enjoy the profits for so many years as

(a) 10, Co. 46.

Michaelmas Term, 11. Geo. 1. In Chancery.

THEOBALDS
against
DUFFOY.

shall be to come and unexpired at the death of *A.* this cannot be good by way of remainder, and is therefore only a possibility, which at law cannot be assigned over, because *A.* has a greater estate; for an estate for life is greater than an estate for years, be it ever so long; therefore if lessee for a thousand years grant it for life, he has granted all his estate, and cannot make any limitation over. Now the reason why a term for years was esteemed in law to be a less estate than a freehold for life is this: In former days, all actions for titles to land were real, and lands being leased for long terms, and fines taken for such leases, it was usual for the lessors, or their heirs, to suffer common recoveries, and by that means the lessees were evicted, because they could not falsify those recoveries, until they were enabled so to do by the statute 21. Hen. 8. c. 15. by which it was enacted, * "that a termor might falsify such recovery, as any tenant of the freehold might do by the course of common law, where he was neither privy or party to the same; and that, notwithstanding any such recovery, he should hold and enjoy his term, according to his lease, against the recoveror, his heirs and assigns." It is true, in those days the terms for years were usually granted for a short time; for nobody would take long terms, because the tenant of the freehold could destroy them *ad libitum*, by suffering a common recovery, as aforesaid: therefore those estates for years were accounted the least, and next to estates at will. But when the statute gave the termor a remedy to falsify a common recovery in defence of his term, then those estates for years became more permanent, and for that reason the lessees took long terms; and when they could not by the rules of law limit remainders over in those terms, they contrived a method to do it by executory devises, and by limitations of trusts, which were supported in equity. Now, though in the principal case this should be accounted a bare possibility, and not assignable at law, yet since the defendant herself had assigned this possibility for a valuable consideration, and would now impeach it, because it was an interest not assignable at that time, though it hath since vested in possession, this seems contrary to good conscience, and a case wherein this Court will interpose and hinder her proceedings at law. Besides, there is another decree made by the Lord Chancellor COWPER in favour of the now plaintiff, which must be taken to be right while it stands unreversed; and until that is done, there ought not to be another decree in the same court in favour of the defendant: and upon the foot of the former decree it appears, that the defendant herself joined with her husband in conveying this right to the plaintiff, who is a fair purchaser of this residue or possibility of the term, and all this done by the consent of her friends, which makes the case much stronger against her; for even a contract made by an infant, by the advice and consent of his friends, has been decreed to be good, and that in the most harsh circumstances imaginable, viz. by turning the interest into principal, upon condition that the creditor would not at that time extend

* [103]

Michaelmas Term, 11. Geo. 1. In Chancery.

THOBALDA
against
DUFFOY.

* [104]

1. Chan. Rep.
29, 30.
Cases in Chanc.
269.

extend the lands of the debtor : and this was the case of the *Lady Betty Cromwell*, an infant, who had a good estate in *Ireland*, but in the time of the rebellion there, she could not receive any of the rents or profits of that estate; and being very much indebted to *Sir James Emery*, by judgments and statutes, he threatened to extend the estate which she had in *England*; which if he had done, there would not be anything left to support her; therefore she, by the consent and advice of her friends, agreed, though an infant, to turn all the interest then due into principal, and to give fresh security for the payment thereof; and this agreement was established against her in this court; and why should it not against a *feme covert*, who has done the like by and with the consent of her friends; and both she and her husband were at that time maintained by the money which the plaintiff paid for this assignment?

THEREFORE IT WAS DECREED, that there should be a perpetual injunction against the defendant; and that the first vendee should have his term (a).

At the hearing of this cause, THE ATTORNEY-GENERAL insisted, that the defendant being married to an *alien*, the king was entitled to her right; and that nothing vested in the husband by virtue of this marriage to avoid it; and that the assignment could not be good against that right which the king had in this term.

The wife being possessed of a term for years, and having married an alien, the marriage is not a gift in law to him of that term. Ante, 100.

To which it was answered, that if this had been an actual purchase of a term of years by an *alien*, the right would have vested in the king (b); but here the *alien* had no manner of right, for this being a mere possibility, could not vest in him by the marriage. It is true, marriage is a gift in law of a term for years to any subject, but not to an alien, for his wife may sue and be sued as a *feme sole*, notwithstanding her marriage with him.

1. Com. Dig.
"Alien" (C. 4).

But to this matter THE COURT gave no answer, probably because the decree did not concern any right which the king might have, it being only to stay the proceedings at law, and to quiet the plaintiff in his possession.

(a) See *Walmstrey v. Tanfield*, Wms. 608. *Jones v. Rae*, 3. Term Rep. 83. *Fontblanque's Equity*, 1 vol. 203. 208.
(b) Co. Lit. 2. 1. Leon. 47. 4. Leon. 82. 2. Roll. 521. 5. Co. 52.
1. Ch. Rep. 18. *Goring v. Bickerstaff*,
1. Ch. Cases, 8. *Pilleksen*, 31. *Wind v. Jekyl*, 1. Peer. Wms. 572. *Higden v. Williamson*, 3. Peer. Wms. 132.
Duke of Chandos v. Talbot, 2. Peer.

Case 50.

Bateman against Roach.

If a testator devise lands in trust for his nephew A. and for his

THE TESTATOR being seized in fee devised his lands to trustees and their heirs, in trust for his nephew *John Hatheway*, and for his niece *Sarah Bateman*, for their lives, remainder to the niece *B* and the children of the said *B*. by her husband, to receive the profits when they come of age, and also bequeath money for the use of the said children at their respective ages of twenty-one, and afterwards make a codicil confirming those bequests, all the children of *B*. not only those she had at the time the will was made, but those she may afterwards have, take an estate in fee in the lands as tenants in common, and those who die have an equal right with those who live in the money bequeathed. — S. C. 2. Eq. Abr. 293. 303. 332. 336. 1. Ch. Rep. 224. 2. Vern. 530. 2. Com. Dig. "Chan- cery" (3. A. 8.). (3. Y. 8.).

children

Michaelmas Term, 11. Geo. 1. In Chancery.

children of the said *John*, and to the children of the said *Sarah*, by her then husband *Bateman*, in trust that they shall have and receive the profits thereof when they come of age. * The said *John* and *Sarah* had each of them a child when this will was made, but the child of *John* died, and *Mary* (the now plaintiff), who was the child of *Sarah Bateman*, survived.

BATEMAN
against
ROACH.

[105]

The testator having likewise devised four hundred pounds to his said trustees, to the use of the said children, at their respective ages of twenty-one years, he afterwards made a codicil, by which he changed one of the trustees in his will (a), and confirmed all the devises therein; and at that time *Sarah* had two other children, who are since dead.

Now the representatives of the dead children claiming a share of the real estate, and a distribution of the four hundred pounds, the plaintiff exhibited her bill.

And IT WAS INSISTED for her, that this devise being *per verba de presenti*, none but the children born at the time of the making the will could take; like the resolution in *Wild's Case* (b), which was a devise of lands to the husband and wife, and to the children of their bodies, it was resolved, that if they had any children at the time of the making the will, they had only an estate for life; but if they had none at that time, then those children who should be afterwards born would have an estate of inheritance in tail.

BUT ON THE OTHER SIDE it was insisted for the defendant, that though there was but one child at the making the will, yet *Sarah*, the mother of that child, having two more at the making the codicil, they were entitled to take by virtue of the will, which was confirmed by the codicil; for the devise is *per verba in futuro*, and the legal interest was in the trustees.

THE COURT was of opinion, that since *Sarah* had but one child when the will was made, the testator could never intend it to be a devise *in presenti*, so that no other should take but that child, but rather as a future devise, "because it was to "the children of " *Sarah Bateman* by her husband;" and it is very probable, that if he had intended it for the plaintiff *Mary*, who was the only child at the time of making the will, he would have taken notice of it in the codicil, when there were two other children to share with her; and though the expression as to the profits, *viz.* "that they shall "have and receive all the rest of the profits (after legacies paid) "when they come of age;" yet they have a right to it in their minority, at least to so much thereof as may be sufficient for their support and maintenance (c).

(a) See *Atcherly v. Vernon*, ante, 68.

(b) 6. Co. 16.

(c) *Collins v. Metcalf*, 1. Vern. 462.

Atkins v. Hiscor, 1. Atk. 501. *Van v.*

Clarke, 1. Atk. 512. *Walcott v. Hall*,

2. Brown C. C. 305. *Goss v. Nelson*,

1. Burr. 227.

Upon

BATEMAN
against
ROACH.

* Upon the whole, THE COURT was of opinion, that these children took an estate in fee, as *tenants in common*; and as to the four hundred pounds devised to them, that they who died had an equal right with the plaintiff *Mary*, who survived; for it is a standing rule in this court, that where a portion or legacy is to be paid out of an estate in *lands*, at such a time, or at such an age, there, in favour of the heir at law, if the legatee die before the day, the legacy or portion is sunk and gone (*a*); but it is otherwise if the legacy is to be paid out of the personal estate (as in the principal case), for there it vests immediately (*b*), and not to be devested, though the legatee die before the day appointed for the payment.

Therefore IT WAS DECREED, that the trustees should account for the distributive shares of the two children (who died) out of the said four hundred pounds, and also for their shares of the profits of the lands from the death of their mother to the time of their death, and that they shall have all reasonable allowances, and leave to apply to the Court at any time when they shall find it necessary so to do.

(*a*) *Smith v. Smith*, 2. Vern. 92. *Harrison v. Naylor*, 3. Brown C. C. 108.
Jennings v. Look, 2. Peer. Wms. 271.
Bard v. Brown, 2. Chan. Cases, 165.
Carter v. Bletset, 2. Vern. 617. *Prowse v. Abington*, 1. Atk. 485. *Van v. Clarke*, 1. Atk. 510. *Duke of Chandos v. Talbot*, 2. Peer. Wms. 610. *Gordon v. Raynes*, 3. Peer. Wms. 138. *Gawler v. Strandwich*, 1. Brown C. C. 106.
(*b*) *Burdet v. Young*, ante, 93. *Rivers v. Derby*, 2. Vern. 72. *Cooper v. Scott*, 3. Peer. Wms. 119. *Wilson v. Spencer*, 3. Peer. Wms. 192. *Tunstall v. Brachen*, 1. Brown C. C. 124. *notis. Hinchinbroke v. Seymour*, 1. Brown C. C. 395.

Case 51.

Neeve and Others against Keck.

A man covenanted for himself and his heirs to surrender a copyhold estate to such uses, and died before it was done; and a bill was brought against his heir for a specific execution of this covenant, and decreed accordingly.

S. C. 2. Eq. Ab. 24.
Ante, 62.
Ch. Caf. 252.
2 Pr. Wms. 467.
2. Vern. 97.
2 Com. Dig. "Chancery."
(2. X. 1.)

THIS was a bill brought by the daughters and heirs of *Oliver Neeve*, by a former venter, against the defendant, who was heir at law to *Francis Neeve*; and it was to have a specific execution of a covenant to surrender copyhold lands made by the said *Francis* on the marriage of *Oliver* with his second wife, who was the daughter of one *Sheffield*.

The bill sets forth, that in consideration of the said marriage, the aforesaid *Oliver*, *Francis*, and *Sheffield*, agreed to settle their several estates to the uses following:

The estate of the said *Oliver* was to be settled to the use of himself and his intended wife for life, remainder to the first and every other son and sons of the body of the said *Oliver*, on the body of *A. B.* his intended wife to be begotten; with several remainders over; remainder to the right heirs of the said *Oliver* for ever. *Mr. Sheffield* agreed to settle his estate to the use of himself for life, and after his decease, to the use of the said *Oliver* and *A. B.* his intended wife for life, remainder to the sons of that marriage in tail male, &c. *Francis Neeve* agreed to settle his estate to the use of himself and his wife for life, with like remainders to the sons of *Oliver* in tail male.

And

* And pursuant to this agreement, the estates of the said *Oliver* and *Sheffield* were settled to the uses aforesaid; and the said *Francis Neeve*, in order to keep his estate in his name and blood, and in consideration of the said marriage, and of the natural love and affection which he did bear to his cousin *Oliver Neeve*, and in consideration of five shillings to him paid by the said *Oliver*, covenanted for himself and his heirs to stand seised of the lands, &c. to the use of himself for life, remainder to his wife for life, remainder to *Oliver* and his wife for life, remainder to the first and every other son and sons of the said *Oliver* in tail male, remainder to the right heirs of *Oliver* for ever; and for the consideration aforesaid, he covenanted for himself and his heirs to surrender his copyhold lands to the same uses before *Michaelmas* following.

NEEVE
AND OTHERS
against
KECK.

Francis Neeve the covenantor and his wife are both since dead, and now this bill was brought against his heir at law to have a specific performance of the aforesaid covenant, having bound himself and his heirs to perform the same.

THE ATTORNEY-GENERAL, who was of Counsel for the defendant, confessed the agreement and the settlements made as set out in the bill; but insisted, that the defendant was not obliged to carry this covenant into execution. It is true, the settlement made by *Francis* was in consideration of this marriage, and to keep the estate in his name and blood; and so far *Francis* would have been obliged to perform this covenant (a), and so would his heir at law (b). But since the plaintiffs in this suit are the daughters of *Oliver* by a former venter, they are not likely to continue the estate of *Francis* in his name, for when they marry they must change their names; neither are they within any of the considerations of this settlement; therefore in respect to them, this covenant stands merely on the foot of a voluntary conveyance; and such a covenant was denied to be carried into execution against an heir in favour of a brother (c), for no other reason but because it was voluntary.

IT WAS ARGUED for the plaintiff, that this was a good and formal covenant to bind *Francis Neeve* and his heirs, and that there was a very good and sufficient consideration for the same; for the marriage of *Oliver* is a consideration which goes through all the uses of this conveyance; but if that alone did not go through all the uses, yet *Oliver* and *Sheffield* having settled their respective estates on this marriage, those settlements, * together with the marriage, are considerations sufficient to raise all the uses therein-mentioned. Now *Francis* having covenanted for himself and his heirs to surrender his copyhold lands before *Michaelmas* following to the same uses he had conveyed his freehold estate, he is a trustee in this court for the covenantee until that is done; and though he did surrender within the time, viz. before *Michaelmas*, according to the

* [108]

(a) *Peyton v. Bladwill*, 1. Vern. 240.

(c) 1. Cases in Chancery, 243.

(b) *Wright v. Wright*, 1. Vezey, 409.

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NEVE
AND OTHERS
against
KECK.

covenant, yet that is not material in a court of equity, where there is no regard had to such circumstances of time or place when the estate is once bound by the covenant; and as to the length of time before this bill was brought to have a specific performance of this covenant, it cannot with any colour of reason be objected to the plaintiffs, because they commenced this suit within a year after the remainder limited to them vested in possession. It has been objected, that in respect to the plaintiffs this covenant is voluntary, and stands merely on the foot of a voluntary conveyance, but certainly there is a wide difference between a voluntary conveyance and a voluntary covenant; for if a voluntary conveyance should be defective, this Court will not enforce the execution thereof, because it being defective, it doth not bind in law; but as by a voluntary covenant a man is bound in law, so he is also bound in conscience in a court of equity; and the only reason why this Court will enforce a specific execution of such a covenant is, because it is a more adequate remedy than the damages which might be given by a jury on an action at law for breach of the covenant (a). Therefore, since *Francis Neeve* hath bound himself and his heirs by this covenant, and since *Oliver* was a purchaser under it, the plaintiffs, who are his heirs, are likewise purchasers, and ought to have a specific execution of this covenant; and the rather, because the widow of *Francis* enjoyed this copyhold estate during her life, by virtue of this covenant; so that the defendant hath thereby admitted an execution thereof in part of the uses limited thereby.

* [109]

THE COURT was of opinion, that there were several considerations in these settlements sufficient to raise and support the uses. And first, it is probable that *Oliver* would not have settled his own estate in that manner which he had done but in prospect of the estate now in question; for by that settlement there is no provision made for younger children; so that if there should happen to be a son of this marriage, the rest of the children would have nothing out of their father's estate but what he could provide for them in his life-time; and sometimes it is very prejudicial to a family where the father hath a great estate, and no power to charge it with portions for younger children: as for instance, this case happened. The testator devised an estate of four thousand pounds a-year to the devisee for life, remainder over, but without any power of making a jointure to a wife; afterwards the devisee settled all his own estate in jointure on the woman he intended to marry, and with whom he did marry, and then he died without issue; so that the estate which he took by the will went over to him in remainder, and the paternal estate was all in jointure to his widow, and his next relations had nothing to support them. But in the principal case, *Oliver Neeve*, who married the daughter of *Sheffield*, was made richer, and that might be a consideration for

(a) *Furnival v. Crew*, 3. Atk. 87.

settling

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settling his estate as he did; and the widow of *Francis* enjoyed this copyhold during her life, by virtue of this covenant by which her husband had bound his estate.

NEEVE
AND OTHERS
against
KICK.

Therefore IT WAS DECREED, that the defendant should surrender this copyhold to the use of the plaintiffs and their heirs, and at their expence (a).

(a) See *Tooke v. Hastings*, 2. Vern. 192. *Randal v. Randal*, 2. Peer. Wms. 97. *Hobson v. Trevor*, 2. Peer. Wms. 464.

Wing against Wing and Others.

Case 52.

THIS was a bill brought by the father against his own son, and against the father of his wife, to have a deed of settlement set aside, because not made pursuant to the articles of marriage between him and his wife; wherein the plaintiff suggests, that he was imposed on, and sets forth several instances of oppression by the contrivance of his own son and his father-in-law; particularly, that it was agreed in and by the marriage-articles between the plaintiff and his wife on their intermarriage, to settle his wife's estate (which is the estate now in contest) on the plaintiff and his wife for their lives, without impeachment of waste, remainder to their issue; but that afterwards a deed of settlement was made, by which the plaintiff and his wife were made tenants for life only, and by consequence subject to be impeached for waste; that the plaintiff's wife died, and then his son, the defendant, married the daughter of the other defendant, who was an attorney, and intrusted with all the plaintiff's papers, and who very well knew all this matter; and that the plaintiff having afterwards discovered a lead-mine in the premises, and made a lease thereof to one *Jones* for twenty-one years, with power to dig for lead ore, and entered into a covenant for quiet enjoyment, and become bound in an obligation of fifteen hundred pounds penalty, conditioned for performance of covenants, by virtue of which lease the lessee entered and digged for lead ore, but was obstructed by the defendant; whereupon the lessee brought his action against the now plaintiff, who was arrested and committed for want of bail to the action; and all this was done by the contrivance of the defendants and their agents.

A decree was made in the court of exchequer against tenant for life, to hinder him from committing waste, which decree was founded on a deed of settlement; and upon a bill now brought to set that deed aside, the defendant pleaded the decree in the exchequer, which was over-ruled.

S. C. 2. Eq. Ab. 71.

* [110]

The defendants plead a decree made in the court of the exchequer in favour of the son against his father, to hinder him or his lessee to open any mines, or dig for lead ore; and that a perpetual injunction was granted against the now plaintiff.

THE COUNSEL for the defendant argued, to maintain this plea, that there being a perpetual injunction against the now plaintiff in a court which hath a proper jurisdiction, and can enforce an obedience to their decree, it would be inconsistent to have a contrary decree made between the same parties in this court, whilst the first decree stands unreversed; therefore to obviate that inconveniency, it was insisted for the defendant, that this plea might be allowed.

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WING
against
WING
AND OTHERS.

Besides, the plaintiff (as it is proved in this cause, and as it appears in this deed of settlement which he would now avoid) had a power to charge this estate with two hundred and fifty pounds, which might be a consideration for the leaving out, or for his not insisting to have an estate for life, without impeachment of waste, which sum was at that time a smart charge on the lands, being then of the value of thirty pounds *per annum*, and no more, though since the making the said articles and settlement, the estate is very much improved by a casual discovery of some treasure in the bowels of the earth, but that cannot be a reason to make an equitable construction of this agreement.

Now if this settlement should be set aside, it may be difficult to know what estate the plaintiff would insist on; for probably he might insist on an estate-tail, by virtue of the articles, the limitation being to him and his wife for their lives, remainder to their issue; and by this means would strip the defendant of any benefit he might claim to those lands.

* [111]

* Therefore since there is a decree made in the court of exchequer for the now defendant against a tenant for life, to hinder him from committing waste, or digging mines, and a perpetual injunction for that purpose;

For these reasons it was insisted, that this plea might stand, for that this Court cannot control a decree made in the court of exchequer, which is equally binding with a decree of this court.

THE COUNSEL for the plaintiff argued, that this plea might be over-ruled, for that the decree of the court of exchequer was founded on this very deed of settlement, which the plaintiff would now avoid, and of which he now complains, for that decree is to subsist, and to be supported by that deed; therefore it is inconsistent to plead that to the plaintiff, which he endeavours by this suit to avoid.

Besides, the defendant hath not made any answer to that part of the bill wherein the plaintiff prays an account of the lead ore already dug by the defendant; for this decree and injunction on which he relies is only to hinder the plaintiff to dig for ore in this land, but it gives the defendant no right to dig there during the life of the plaintiff; neither doth it preclude him from having an account of what is already dug by the defendant or his agents.

Moreover, a decree may be obtained in the court of exchequer by fraud, as well as a judgment in the courts of common law; and though this Court cannot reverse either, yet when the fraud and practice appears, they may compel the parties to take no advantage thereof, as being against all conscience and equity.

Now it appears, that this decree was obtained by fraud and oppression; for the attorney (who is one of the defendants in this cause, and whose daughter married the plaintiff's son) had all the papers

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papers of the plaintiff in his possession, and concealed them whilst the proceedings in the exchequer were carrying on against him; so that he could not make any defence in that cause, for want of the articles which he suppressed.

Wife
against
Wife
AND OTHERS.

And it is in proof, that the now plaintiff was in custody at the time this decree was made, and long before, and that it was made *ex parte* upon an affidavit of serving him with a *subpoena*; so that it being obtained by fraud in suppressing the articles, it cannot be a bar to the plaintiff to have an account of the profits, and to have this deed set aside.

* It was admitted by the defendant's Counsel, that by the articles the plaintiff was to have an estate for life, without impeachment of waste; but it was insinuated, that before the deed of settlement was executed, the parties came to a new agreement, by which the plaintiff had power to charge the estate with two hundred and fifty pounds, and that might be the reason why that clause (without impeachment of waste) was left out of the settlement, which is very true, if the fact was so; but that very sum was likewise mentioned in the articles which the plaintiff was to have and receive out of his wife's estate; and it is not pretended that it was ever paid.

[112]

THE COURT was of opinion, that the decree in the court of exchequer, and the injunction to stay waste, were founded on this deed of settlement, which if set aside, the other must fall of course; and that there was such an appearance of hardship and oppression in this cause, that the Court held it reasonable to over-rule this plea; and told the defendant's Counsel, that at the hearing of the cause they might take what advantage they could thereof; and then THE COURT would consider, how far this decree in the exchequer shall conclude this Court in this cause.

Waste against Mocato.

Case 53.

THERE was an agreement between the plaintiff and the defendant, that the plaintiff, in consideration of thirteen hundred pounds to be paid to him by the defendant, should assign a term of years, which he had in certain houses in London, which were leased to him by THE CITY, with a covenant that the lessee should not alien or assign the term without leave of THE CITY, under the penalty of forfeiting the said term.

But the plaintiff having not yet gotten any licence from THE CITY, the defendant would not take any assignment of this term for years until such licence should be procured, but made over one hundred and fifty pounds South-Sea stock to the plaintiff, as a security to perform the agreement on his part.

Afterwards, and before any licence was procured, the plaintiff assigned all his interest in this term to the defendant, who prevailed with

If a lessee for years covenants not to alien without licence of the lessor, under penalty of forfeiting the lease, and he afterwards alien without licence, equity will not relieve him.
58.
Ante, 22. 97.
Eq. Abr. 108.
2. Com. Dig.
"Chancery"
(2. Q. 9.).

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WAPPE
against
MOCATO.

with the plaintiff, that the consideration mentioned in the assignment should be six hundred pounds, and no more; which was done because the true value might be concealed from THE CITY; fearing that when the defendant should renew the term, THE CITY might raise the fine and the rent in proportion.

* [113] * Now it being plain that the plaintiff could have no remedy at law to recover any more than six hundred pounds, that being the consideration mentioned in the assignment, and probably not that neither, because having assigned the term without licence from THE CITY, it was a forfeiture thereof; and by that means, and by colour of an entry and eviction by THE CITY, the plaintiff would be barred of his demands; therefore this bill was brought to have the thirteen hundred pounds, according to the agreement for the assignment of this term for years, and to be relieved upon the whole matter set forth as aforesaid.

The defendant by his answer insists, that he was to pay but one hundred and fifty pounds *South-Sea* stock for the aforesaid assignment, and that the houses were of little value, and that the plaintiff had forfeited this term by making an assignment thereof without licence, and therefore the assignment was void.

THE COURT. Where a man makes a lease for life or for years, upon a condition of re-entry for a forfeiture, or that the lease shall be void if the lessee assign or alien it without licence, and afterwards the lessee assigns it without licence, this is a forfeiture, and such a forfeiture against which this Court cannot relieve, because it is unknown what shall be the measure of the damages; for this Court never relieves but in such cases where it can give some compensation (a) in damages, and where there is some rule to be the measure of such damages, to avoid being arbitrary (b).

(a) 3. Chan. Cases, 135. 1. Vern. S. C. 2. Vern. 222. Grimston v. Lord
83. 1. Vern. 270. Bruce, 1. Salk. 156. S. C. 2. Vern.
(b) Hack v. Leonard, ante, 91. 594. Dorrington v. Jackson, 1. Vern.
Wallis v. Grimes, 1. Chan. Cases, 89. 449.
Popham v. Bamfield, 1. Vern. 79. 167.

Case 54. Mitford and Others against Lord Herbert, Pritchard, Croom, and Others.

Where a person insisted on an absolute gift by the intestate in his life-time, when it appeared to be only a trust.

S. C. 2. Eq. Ab.
6.

JOHN BROMLEY being possessed of a considerable personal estate married the daughter of the defendant *Pritchard*, from whom he afterwards departed, and thereupon she obtained a sentence for *alimony*, which he the said *Bromley* disobeying, he was *excommunicated*. Then he went to *Paris*, and placed two thousand pounds in the Town-house there, in the *Lord Herbert's* name, and had a mortgage on the *Duke of Powis's* estate for securing the repayment of a thousand pounds, and interest, and had two hundred and forty pounds in ready money and jewels in his trunk, and some wearing-

wearing-apparel, and died intestate. After his death, the aforesaid *Croom*, one of the defendants, possessed himself of this two hundred and forty pounds, and of all * the jewels and wearing apparel, pretending the same were given to him by the intestate in his lifetime; and the widow of the said *Bromley* having by her last will devised some legacies, made the defendant *Pritchard* executor, and died. Afterwards *Pritchard*, by virtue of the said will, possessed himself to the value of seven hundred pounds of the said intestate's estate.

MITFORD
AND OTHERS
against
LORD
HERRERT,
PRITCHARD,
CROOM,
AND OTHERS.

Thereupon THE PLAINTIFFS, as nephews and next-of-kin to the said *John Bromley*, exhibited this bill to have a distribution made to them of a moiety of the said intestate's estate; and that though *Pritchard* is entitled to the other moiety by virtue of the will of his widow, yet he ought to take a moiety of the bad debts as well as of the good; and that the defendant *Croom* might be accountable to the plaintiffs for a moiety of the said *Bromley's* estate in his (*Croom's*) hands, notwithstanding the pretence of a free gift made thereof to him by the said *Bromley* in his lifetime.

THE COUNSEL for the defendant *Pritchard* submitted to account for a moiety of the said *Bromley's* estate in his the said *Pritchard's* hands; but insisted, that he is entitled to have an allowance of such debts which were owing to him by the intestate, who having left his wife, the daughter of the said *Pritchard*, without any support, and being gone into places remote, she was maintained by the defendant *Pritchard* several years; so that he is entitled to retain so much of her husband's estate as shall be accounted a reasonable satisfaction for such maintenance, and as a debt due to him from the husband.

And as for the pretended gift to the other defendant *Croom*, it will be the interest of the defendant *Pritchard* to have it set aside, for then he, as executor to the widow of the intestate, will be entitled to a moiety of his estate in his hands; for in truth it was not a gift, but a trust in him, contrived between the intestate and the said *Croom*; for that the intestate, being *excommunicated*, could not make a will; and if he had made one, it could not have been proved; so to avoid this disability, this method was contrived between them to dispose the personal estate in the life-time of the intestate.

As for *Adderley*, another of the defendants, there being no proof that he intermeddled with any of the intestate's goods, the bill, as against him, ought to be dismissed with costs.

* So that the chief contest in this cause was concerning the two hundred and forty pounds received by the said defendant *Croom*, which, as his Counsel insisted, was an absolute gift to him a few days before the intestate's death, subject to pay two legacies of ten pounds a-piece, and to pay his apothecary's bill, and the

* [115]

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against
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HERBERT,
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AND OTHERS.

expences of his funeral ; and since, being excommunicated, he could make no will, it is the more reasonable he should dispose his estate in his life-time in this manner ; and it is in proof, that he often declared that his own hands should be his executors, and that he would give all away whilst he was living ; and this is a very natural disposition to the defendant *Croom*, who was his near relation and godson, and the person whom he most trusted during the time he absconded on the account of the excommunication, and the prosecution by his wife and her friends.

So that it is a donation *mortis causa*, and that is, where anything is given for fear of death on some thoughts of a present or future danger ; which donation is gratuitous, and an absolute gift, and the defendant is properly entitled to the benefit thereof ; and therefore not to account to the plaintiffs, or any other, for this gift.

THE COUNSEL for the plaintiffs averred, that the defendant *Pritchard* had admitted a great part of what they had prayed in the bill, but that he insisted on the allowance of some debts due to him from his daughter, the intestate's wife, and which he ought not to retain out of the money in his hands, but out of all the moiety of the intestate's estate to which he was entitled by virtue of her will.

And as for what is insisted on by the defendant *Croom*, that the intestate in his life-time gave him the two hundred and forty pounds now in his hands, there is no colour that he should not account for it ; for admitting it was a donation *mortis causa*, such a gift is good by the civil law as a will ; but by that law an excommunicated person cannot make a will ; for if he could, then such persons might dispose of their estates by will in this manner.

Neither was this an absolute gift to the defendant *Croom* ; for it is in proof, that it was a bare trust ; and this appears by the best proof that can be made, and that is *testimonium rei*, for after the delivery of the goods, and the receipt of this money, the intestate appointed *Croom* to pay such debts and legacies to his nephews. Besides, there is a very strong presumption, that the testator was not of a disposing memory at the time of making this pretended gift ; for he said, it was all which he had in the world ; so * he forgot a great sum which he had in the Town-house at *Paris*, which can never be intended if he had been in his senses.

THE COURT was of opinion, that this was an odd claim by the defendant *Croom*, as an absolute gift of this two hundred and forty pounds, when it plainly appears to be a trust. It is true, he swears in his answer, that the intestate gave him all his personal estate, and directed him to pay the apothecary's bill, and ten pounds a-piece to his two nephews ; but this direction was subsequent in time to this pretended gift, and that proves it to be a trust for the intestate.

Therefore

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Therefore IT WAS DECREED, that the defendant *Croom* should account, and that the bill should be dismissed with costs as to *Adderly*; and as for the other defendant *Pritchard*, that he should be allowed what was due to him for the maintenance of the intestate's wife whilst he was living, but not for her maintenance since her husband's death; but he is not entitled to costs of this suit, unless they had been taxed, and ascertained in the life-time of her husband.

MITFORD
AND OTHERS
against
LORD
HERBERT,
PRITCHARD,
CROOM,
AND OTHERS.

Ord against Blackett.

Case 55.

ONE Ord, who was seised of an estate worth four hundred pounds a-year, had a natural daughter by *Sir William Blackett*, to which daughter she devised "all her estate," and made her sister *Martha Ord* executrix, and appointed her to be guardian to the infant (a), and died.

Where a person was reported by a master to be a fit guardian to a natural child, yet such guardian was not allowed, but the child was placed with the father who owned her.

The executrix, pursuant to the will, sued for this estate, but died soon after the suit was begun, having first appointed the now petitioner *Ord* executrix, who renewed the suit, and recovered the lands for the infant.

S. C. 2. Eq. Ab.
487.
Ante, 42.
Post. 138.
Amb. 306.

But *Sir William Blackett* removed her from school last *Christmas*, and sent her into the country, where she has been kept ever since; for which reason the petitioner made application to the court of chancery, complaining, that the infant was removed from a school where she might have proper and suitable education, and sent into the country, where she could have none.

This petition being referred to a MASTER to name a proper school, and a guardian for this infant, he reported the petitioner to be a fit guardian, and *Mr. Cavalrie's* school a proper school for her education.

The petitioner therefore petitioned, that the child might be delivered to her, and sent to the said school.

* The Counsel for *Sir William Blackett*, the child's father, and who owns her as his daughter, and who preserved this estate for her against the heirs at law, consented to send the child to *Mr. Cavalrie's* school, but opposed the delivery to the petitioner, or that she should have the laying out any money for clothes, or other necessities, for the child, she being very poor, and having already pretended, that she deserved one hundred and eighty pounds for her care in attending this child; therefore the money to be laid out for necessities ought rather to be paid to *Mr. Cavalrie* or his wife than to the petitioner.

* [117]

THE COURT was of opinion, that removing this child from school into the country, to *Sir William Blackett's* house, could

(a) That a mother cannot appoint a guardian by will, see *Vaughan*, 130. *Ex parte Edwards*, 3. Atk. 519.

neither

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Ord
against
BLACKETT.

neither be useful or instructive to her, because he was a single man, and kept no persons proper for her education; yet it was not thought reasonable to remove her from his care, since he owned her to be his child (a), but that he should pay the costs of the petitioner's application to the court out of his own money; for otherwise he might remove her from one school to another, and the costs of applying to this court would be paid out of the infant's estate.

(a) See *Roach v. Gouvan*, 1. Vezey, kins' Case, 3. Peer. Wms. 152. Ward 158. *Mellish v. Da Costa*, 2. Atk. 15. *v. St. Paul*, 2. Brown C. C. 583. *Harg. Co. Lit.* 88. b. note (12). *Hop-*

Case 56.

Smithson and Others against Dodson.

Tithes of hay
ought to be paid
in grass cocks.

S. C. 2. Eq. Ab.
735.
Carth. 264.

THIS was a bill brought by the parishioners of *Gargrave*, in *Yorkshire*, against the defendant, their VICAR, to produce an ancient terrier in his custody, which shews the method of payment of tithes in that parish, which they suggest to be a *modus*, viz. for hay the vicar is to have the tenth grass-cock (a), and three half-pence for every milch-cow, and a penny for every swarm of bees, and sixpence for every orchard.

The bill prayed, that the Court would direct an issue or trial at law to settle this *modus*; and sets forth, that the predecessor of the defendant did, about thirty years since, alter the payment of this *modus*, and combined at that time with his clerk to raise the fees for burials, &c. which fees had been paid ever since.

[118]

The defendant admits there was a *modus* some years since for payment of tithes in this parish, and that he has a terrier in his custody of all the tithes payable to the vicar, and that he had been very much harrassed at law, when he was willing to take the tithes according to the terrier in his custody, so as he might have them peaceably; and as to the fees for burials, marriages, christenings, and churching of women, he * insists, that the same should be paid as usual; for that they were not proper for a *modus*, because there is no canon to ascertain what shall be paid, if the sums now paid should be discharged; but it is not in other cases; for if a *modus* should be destroyed, then tithes in kind must be paid; therefore, as to that matter, the bill is improper, and ought to be dismissed, since the Court hath nothing before them to ascertain the measure of such fees; and the defendant is in no fault, but by continuing the payment of the fees as he found them paid before he was vicar.

THE COURT held, that the tithe-hay must and ought to be paid in grass-cocks; and as to the tithes of cows, bees, and orchards, the parties did not differ in the manner of payment, but only in the surplice-fees for burials, &c.

(a) See *Barham v. Gawfe*, 1. Roll. Abr. 644. *The Cumberland Case*, 1. Roll. Rep. 172.

Therefore

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Therefore IT WAS ORDERED, that they should attend A MASTER to settle how far they differ in that matter, and the consideration of costs should be reserved until THE MASTER makes his report. SMITHSON
AND OTHERS
against
DOBSON.

But as to that part of the plaintiff's demands which the defendant did not controvert, nor insist on anything to the contrary, the parishioners were ordered to pay costs. Where the parishioners shall pay costs.

Lucas, Executor of Sir Robert Adams, against Adams. Case 57.

THIS was a bill brought by the executor of *Sir Robert Adams*, to have an account of three hundred pounds borrowed of him by the defendant *Adams*, for the payment of which said sum, with interest, the defendant entered into a bond to the said *Sir Robert Adams* of the penalty of four hundred pounds, conditioned for the payment of two hundred pounds, and at the same time gave him two notes under his hand of fifty pounds each note, but afterwards, by unfair means, prevailed on the obligee, who was superannuated, and not in his senses, to give him (the defendant) a release of all demands on the payment of twenty pounds, and on pretence of being his near relation. The obligor, on payment of 20l. to the obligee, procured a bond and notes for money to be delivered up to him, upon pretence that he was poor, and nearly related to the obligee; but that not being proved, he was ordered to account for the bond and notes.

The defendant, by his answer, says, that he, being nearly related to *Sir Robert Adams*, did borrow the money of him as mentioned in the bill; but being poor, he, the obligee, when he was in his perfect senses, viz. in the year 1714, promised to forgive him this debt, which, in the year following, viz. in the year 1715, he did accordingly forgive; therefore insists, that he is not liable to account for it to the plaintiff. S. C. 2. Eq. Ab. 6. 482.

* THE COUNSEL for the defendant admitted, that there was AN INQUISITION taken, by which *Sir Robert Adams* was found to be out of his senses; which inquisition was taken in the year 1720, but goes no farther back than three years, viz. to the year 1717; and this debt being discharged in the year 1715, the defendant is willing to try, whether the obligee was then in his senses, or not? * [119]

THE COUNSEL for the plaintiff said, that if the Court should make the least difficulty to decree for the plaintiff upon reading his proofs in this cause, that he would then be willing to try it at law, whether the obligee was in his senses at the time he executed this release; but if upon the proofs it should appear, that he was not in his senses, then the plaintiff ought not to be sent to a trial of that matter at law. It is true, the defendant swears in his answer, that he did believe that the obligee had not forgot either the bond or the notes at the time of his sealing this release, which he obtained as his near relation, but gives no manner of proof how, or how near, he was related, which he ought to have done, because it is the pretended consideration of this release; therefore if that fails (as it doth)

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LUCAS,
EXECUTOR OF
SIR
ROBERT
ADAMS,
against
ADAMS.

doth) the rest must fall of course : as where the testator devised one hundred pounds to T. S. by the name of his cousin T. S. when in truth he was not related to the testator, in such case the legatee shall never have this legacy.

Besides, there is no manner of proof that any such consideration of nearness of relation was mentioned at the time the release was executed, but that the defendant brought twenty pounds, and told the obligee, that he had a bond, which he came to pay, and immediately on payment of the said money he got up the bond, and obtained this release ; but after all, the payment of the said twenty pounds is inconsistent with the pretended consideration of nearness of relation, which the defendant hath set forth in his answer.

THE COURT. Here is a bond got by the obligor from a weak person, the obligee, and a release of all demands, upon pretence of nearness of relation, and of being poor ; but neither of these considerations are proved in the cause. But it plainly appears, that the obligor paid twenty pounds as a consideration of this release ; and there being no notice taken at that time of what sums were due, either on the bond or notes, this seems to induce a suspicion, that the payment of that money was the only consideration of delivering * them up, and executing this release ; and that the obligee did not know at that time that anything more was due to him, being very weak and forgetful, and incapable of transacting any business.

So IT WAS DECREED, that he should account both for the bond and notes.

Cafe 58.

Cox and Others against Coffin and Others.

Bill against a mortgagee, to compel him to reconvey upon payment of principal and interest.

THE PLAINTIFF, who was heir at law, exhibited a bill to redeem a mortgage made by his ancestor.

THE CASE upon the pleadings was thus : One *Butchin* having occasion for money borrowed it of one *Fry*, and to secure the repayment thereof, with interest, he mortgaged his lands to *Fry* for two thousand years, with A PROVISIO to be void upon payment of the principal and interest ; and soon afterwards he died. In the year 1696, the plaintiff and her sister, who were heirs at law to the mortgagor, exhibited their bill to redeem, and the defendant *Coffin* was employed by them to prosecute the suit ; and *Fry* the mortgagee, in his answer to that bill, submitted to a redemption upon payment of the principal and interest ; but *Coffin* persuaded them, being ignorant women, to drop that suit, alledging, that the lands were not worth redeeming. *Fry* the mortgagee, some time afterwards, by will, devised this term and estate to one *Grove*, whom he made executor, and died ; and then the now defendant, *Coffin*, purchased it of the said *Grove*, and by his agent, *Willis*, threatened the now plaintiffs to exhibit a bill to foreclose them of the

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the equity of redemption. The now defendant *Coffin*, after he had purchased this term of *Grove* for one hundred pounds, in consideration of so much money paid to him, assigned part of the estate to one *Lake* for five hundred years, being part of the said term of two thousand years, and afterwards sold the remainder of the term to *Willis*.

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Now the end of this bill was, that the defendant *Coffin*, who knew the plaintiffs' title, and by unfair and fraudulent means dissuaded them from pursuing their right, and afterwards purchased this mortgage for himself, may be obliged to re-convey upon payment of so much money which he paid for the purchase.

THE COUNSEL for the plaintiffs said, that there were two things to be considered in this cause: FIRST,* Whether this is a redeemable estate; and, SECONDLY, If so, then on what conditions it shall be redeemed?

* [121]

As to THE FIRST POINT, It is plain, that this is a redeemable estate; for upon filing the first bill, *Fry*, the original mortgagee, under whom the defendant claims, submitted to a redemption; but the defendant *Coffin*, who was then solicitor for the plaintiffs, dissuaded then to redeem; and the other defendant *Willis*, who acted for *Coffin*, threatened to foreclose the equity of redemption: now this shews, that he knew it was a redeemable estate; therefore the plaintiffs are entitled to redeem.

As to THE SECOND POINT, Upon what terms the plaintiffs shall redeem, it was insisted, that they should redeem upon payment of the principal sum of one hundred pounds, and interest, which said sum of one hundred pounds the defendant *Coffin* paid to *Grove* upon the purchase of this term; for as he was solicitor for the plaintiffs, he is to be taken as a trustee for them, and therefore should be contented to receive what he paid for them, deducting the rent.

And as for *Lake*, who took the term of five hundred years of *Coffin*, this seems to be a trust for him; but if it was granted to him *bona fide*, without any trust, yet he took it with his eyes open, and shall not be in a better condition than *Coffin*, under whom he claims.

Therefore it was insisted for a decree to redeem, &c. (a).

(a) *Jafon v. Eyres*, 2. Chan. Cases, 33.
Howard v. Harris, 1. Vern. 33. 190.
Manlove v. Ball, 2. Vern. 84. *Willet*
& *Winnel*, 1. Vern. 488. *Croft v.*

Powell, Comy. Rep. 603. *Exton v.*
Greaves, 1. Vern. 138. *Floyer v. Le-*
vington, 1. Peer. Wms. 268.

HILARY TERM,

The Eleventh of George the First,

IN

The Year

1724,

IN

The Court of Chancery.

The Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

• [122]

* *Buggins against Yates.*

Cafe 59.

ONE *Buggins* being seised in fee of several estates in *Middlesex* and *Worcestershire*, in the year 1674 devised the lands in question to *Mary Buggins*, his wife, and to her heirs and assigns for ever, to be sold to pay his debts and legacies in aid of his personal estate.

But the personal estate being sufficient to satisfy and discharge all his debts and legacies, and the real estate not being sold, the plaintiff, as heir at law to the testator *Buggins*, insisted, that he is entitled to these lands as a resulting trust for him, and that the devisee was a trustee for that purpose.

THE COURT was of opinion, that where lands are devised to be sold in aid of the personal estate for payment of debts and legacies, and the lands are not sold, for that the personal estate is sufficient to discharge the whole, it is plainly an implied trust in the devisee

Lands devised to his wife and her heirs, to be sold for the payment of debts and legacies in aid of the personal estate, and not being sold; if the personal estate is sufficient to discharge the whole, the heir shall have the lands as a resulting trust. S. C. 2. Eq. Ab. 588.

Ch. Cases, 197. 2. Vern. 245. 247. 2. Ch. Cases, 115. 1. Salk. 153. 3. Peer. Wms. 193. 2. Com. Dig. "Chancery" (3. A. 5.). T. Vezey, jun. 444.

for

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for the heir at law, and he is entitled to come into this court to have a reconveyance, and an account of the profits (a).

Devise void for
uncertainty.

And THE COURT being about to make the decree, it was said, that here was likewise a trust of the personal estate, viz. the testator in his will declared, that he did not doubt but his wife would be kind to his children.

But THE COURT was of opinion, that those words gave a right to no child in particular, or a right to any particular part of the estate, * but that the clause was void for incertainty (b):

* [123]

And thereupon IT WAS DECREED, that the defendant should make a reconveyance of the real estate.

In what case the
Court will direct
an inquiry
into the personal
estate of a testator.

But then IT WAS INSISTED *for the defendant*, that the Court would direct an inquiry of the value of the testator's personal estate, because it appeared in the cause, that there was fix thousand nine hundred pounds standing out in debts and legacies; and that the personal estate amounted to four thousand pounds, and no more, so that if the devisee paid the rest of the debts and legacies out of her own effects, she is intitled to be repaid out of these lands devised to her; and there is a very strong presumption that she paid to the value of this land; for there is a legacy of two thousand pounds devised to her, which she never raised, because she apprehended the estate was her own, being devised to her and her heirs; and therefore she devised it to her second husband *Yates* for life, which he enjoyed twenty-two years under that devise, and she likewise devised the inheritance in parcels to her three sons, viz. to the plaintiff, and the defendant, and to another son she had by her husband *Buggins*; and the plaintiff, after the death of *Yates* the second husband, entered by virtue of that devise; and by his bill he claims under the will of *Mary Yates*, so that he admits she had a power to devise, which is enough to affirm the right of the defendant.

Executory devise.

Besides, there is another thing to be considered in this cause, viz. *Mary Buggins*, the widow of the testator, upon her intermarriage with *Yates*, reserved a power to dispose this estate as she should think fit, notwithstanding her coverture, and after the said marriage, she devised it to her husband *Yates* for life as aforesaid, remainder in parcels to her three sons and their heirs; " PROVIDED " that if any or either of her sons died under twenty years, and

(a) See *Maffey v. Sherman*, Amb. 320. *Wynne v. Hawkins*, 1. Bro. C. C. 179. *Nowlan v. Neligan*, 1. Bro. C. C. 491. *Rogers v. Rogers*, 3. Peer. Wms. 193. S. C. Prec. Chan. 81. S. C. 1. Bro. P. C. 66. *Bicknel v. Page*, 2. Atk. 79. *Calton v. Hancock*, 2. Atk. 438. *Walker v. Jackson*, 2. Atk. 625. *Hafelwood v. Pope*, 3. Peer Wms. 325. *Bridgman v. Dove*, 3. Atk. 202. Lord *Inchiquin v. O'Brien*, 1. Will. 83.

Amb. 33. 1. Brown C. C. 458. *Samwell v. Wake*, 1. Brown C. C. 144. *Chetty v. Parker*, 2. Vezey, jun. 271.

(b) See *Cunliffe v. Cunliffe*, Amb. 686. *Harland v. Trigg*, 1. Bro. C. C. 142. *Wynne v. Hawkins*, 1. Bro. C. C. 180. *Nowlan v. Neligan*, 1. Bro. C. C. 489. *Pierfon v. Garnet*, 2. Bro. C. C. 38. 226. *Malim v. Keighley*, 2. Vezey, jun. Rep. 333.

"without

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"without issue, that the share of him or them so dying should go to the survivor or survivors." Now *John Buggins*, one of her sons, died under twenty years, and without issue, so that the lands which were devised to him must descend to the plaintiff and the defendant equally; for this being a common contingency, and having happened, whether it is by limitation of a use, or by executory devise, the remainder over is always good.

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THE COURT was of opinion, that this could not be an *executory devise*, because the testatrix was a *feme-covert*.

But the defendant's Counsel pressing for an inquiry into the value of the personal estate of the testator *Buggins*, though it seemed hard to grant it after such a length of time, * unless there was a very great surplus; yet an account was directed to be taken thereof, and that all the deeds and writings concerning this estate should be brought before THE MASTER; and the consideration of this remainder over should be reserved until the account of the personal estate was taken; and then it would appear what right the testatrix had to devise all or any part, and what part of this estate.

* [124]

Sir John Fryar against Vernon.

Case 60.

UPON A MOTION for a *sequestration* of the defendant's estate in *Ireland*, for a contempt to this court;

The court of chancery will not grant a *sequestration* of lands in *Ireland*.

THE MASTER OF THE ROLLS was of opinion, that such *sequestration* could not be granted, or at least that he would be well advised before he would grant it; for that the process of this court could not affect any lands in *Ireland*. The practice in such cases being to make affidavit, that the person standing in contempt is here in *England*, and being afterwards taken upon process, the Court will oblige him to give bail to abide and perform their decree.

S. C. Cases in C. 5.
S. C. 2. Peer. Wms. 262.
S. C. 2. Eq. Ab. 711.
1. Vern 135.
(3. X.).

421. 2. Com. Dig. "Chancery"

Whitechurch against Whitechurch.

Case 61.

Before the Lords Commissioners RAYMOND and GILBERT.

ONE *Whitechurch*, the ancestor of the plaintiff, had a mortgage for five hundred years of the lands now in question, and took another term for two thousand years of the same land, to commence after the expiration or determination of the first term; and to avoid a merger thereof, he got it conveyed to another person in for 1000 years in the name of a third person, to commence after the determination of the first term, in trust for himself; and afterwards he purchased the fee simple in his own name; and then he devised the said lands to *E. G.* for life, remainder in tail, &c. This will was void so as to pass the lands, because not attested by three witnesses; but it was insisted that it was good to pass the term of 1000 years as a term in gross, and separated from the inheritance; but decreed that it was a term which attended the inheritance by implication of law; for it is not expressly devised for that purpose, and there is no apparent intention, that the testator designed to pass it as a separate interest.—S. C. Rep. Eq. 168. S. C. 2. Peer. Wms. 236. S. C. 2. Eq. Ab. 763. S. C. 1. Stra. 619. 2. Wil. Rep. 236. pl. 60. Gilb. Eq. Rep. 168. 2. Com. Dig. "Chancery" (3. A. S.).

The mortgagee had a term for 500 years and afterwards took another term of the same lands for the first term, 1000 years.

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trust

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against
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trust for the mortgagee; and afterwards he purchased the inheritance in his own name, and it was conveyed to him accordingly, so that he had the legal estate of that term of five hundred years, which stood unmerged by reason of the intermediate term, together with the inheritance in himself.

* [125] Afterwards by will he devised the said lands to the defendant *Whitechurch* for life, remainder to his first, and every other son and sons in tail male, and made *T. S.* his executor, and died,

Now this will was not executed according to the statute; for though it was all of the testator's hand writing, and signed by him, yet it was not attested by three witnesses, as required by the statute; but the executor having assented to the legacy, the defendant was, as he insisted, possessed of the legal estate of this term of five hundred years.

However, the will being not good to pass the inheritance, the plaintiff, as heir at law to the testator, exhibited his bill against the devisee, and against the executor, and against the trustee of the term of two thousand years, to compel them to assign both the said terms to a third person in trust, to attend and protect the inheritance for him, that being the only use of such terms for years, as he insisted.

For the defendant.

IT WAS ARGUED *for the defendant*, that the principal point to be considered in this case, is what estate the testator had in him at the time he made this will; and to judge rightly of that matter, some consideration must be had both of the principles of law and equity. Now a term attending on the inheritance, is in equity to be considered of no other use than to protect the inheritance, though at law it is a separate interest; and if it is only to protect the inheritance, then the testator had no other estate when he made his will, but an inheritance which he had chiefly in contemplation, and intended to pass at that time. It is true, if there had been any express declaration of the testator's intention in this will to pass the term exclusive of the inheritance, there it might pass; but it plainly appears he intended only to pass the inheritance, and there is nothing in the will which necessarily implies a separate devise of this term. It was said, that where a man is seised of an inheritance, and has an unmerged term in notion of law, and he devises the inheritance, the devisee may in this court compel the executor to convey the term to a trustee to attend and protect the inheritance, because the term is in the executor, upon that trust only; and it is very wrong to affirm, that when the inheritance doth not pass, that the heir at law cannot compel such executor to assign the term. It was resolved in the case of the creditors of the *Earl of Pembroke* by simple contract, that they should be paid out of an unmerged term he had in him, because such term was a chattel * [126] liable to their demands; but if the term had been in a trustee for the *Earl*, it had been otherwise. So in the principal case, though the will is not sufficient to pass the inheritance, because it wants that requisite which the statute directs; yet it is sufficient to pass this

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this term to the defendant, who having the legal estate therein, this Court will not interpose, and take it from him in favour of the heir, who is a volunteer; for it is a rule in equity never to interpose in favour of one volunteer to the prejudice of another, but to let him who hath the law on his side take advantage thereof, especially where the interest of a purchaser for a valuable consideration doth not interpose; so that upon the whole it was insisted, that this unmerged term in the same person is to all intents as a term in gross, and shall pass by this will as a chattel interest.

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GILBERT, *Baron*, was of opinion, that this was a term attending the inheritance, and to protect the same from intermediate incumbrances, and that an unmerged term in the same person is in him in nature of a trustee to attend the inheritance; and that it would be very dangerous to all the inheritances in *England*, if unmerged terms should be taken to be terms in gross in the owners of the inheritances, and pass as such. Now in the principal case, if this should be construed as a term in gross, then it is such a chattel interest as may pass by this will, though all the solemnities required by the statute are not observed; but if it is a term annexed unto, and attending the inheritance, it cannot pass by this will in any other manner than the inheritance would pass. Now it has been allowed at the bar, that the term for two thousand years is annexed to the inheritance, but the term for five hundred years is not; but no reason was given why there should be such a difference between these two terms, that one should, and the other should not attend the inheritance: and certainly it can never be said with any colour of reason, that where a mortgagee of a term of years purchaseth the inheritance, that such term when in himself, and unmerged, shall go and descend in another course different from the inheritance; for it is the constant and uniform construction in this court, that such a term shall be annexed unto, and protect the inheritance, and attend the same; and it would be a dangerous construction in equity to make the inheritance and the term separate and distinct estates in one person.

* RAYMOND, *the other Commissioner*, differed a little. He was of opinion, that where the testator expressly devises such a term, or where it comes to an executor by implication, as a chattel interest, *viz.* by a devise of all his chattels; or where it vests in an administrator generally, without making any will; in such cases the heir at law would be proper to apply to this court to have the term assigned to another to attend and protect the inheritance; but that since it is agreed on all hands that this term passeth at law, it is a question, Whether this Court can take it from him to whom it is devised, in favour of the heir at law, who is a volunteer as well as the devisee? It is true, where a term is expressly limited to attend the inheritance, there, though the testator likewise expressly deviseth it to another, it will not pass; but where it attends the inheritance only by construction or operation of law, or in an equitable notion, as a term bought in and assigned by creditors, or

* [127]

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terms raised for children's portions, or for other particular purposes; there, if the testator expressly deviseth such terms, they will pass. But where a man hath a term for years, which by intendment of law only attends the inheritance, certainly he hath a power to sever such a term from the inheritance; and if he should assign it to one man and mortgage the inheritance to another, in such case the term shall not attend the inheritance, but it becomes a term in gross; and why should not a man have the like power to do the same thing by will, if he thinks fit?

But there is this farther to be considered in the principal case, that as in this will there is no apparent intention, that the testator designed to pass this term as a separate interest from the inheritance, though there are sufficient words to pass it in general; then, whether such general words shall, after the death of the testator, sever this term from the inheritance, which attended and protected it in notion of equity, before such devise was made.

But this point was not debated:

For IT WAS DECREED, that the term did not pass by this devise, which plainly appeared to be of the inheritance only, without any intent to pass the one exclusive of the other; therefore the Court was clear in opinion, that the term should not be severed from the inheritance, and pass to the devisee by the general words of this will; though there were sufficient words to pass it, if it had been a term in gross, and that the executor of this will * was a trustee for the heir at law, and his assent to the legacy was of no effect, but that the term was still in him to perform the trust, which he was obliged to execute.

* [128]

A decree for confirming or avoiding a will, where an infant is heir or devisee, is final.

Then ANOTHER QUESTION was made, and strongly insisted on by THE ATTORNEY GENERAL, viz. That the devisee being an infant, the decree should not be final on him, but that he might have leave to shew cause against it within six months (a) after he came of age.

2. Vezey, 23.
1. Brown C. C.
484.
2. Com. Dig.
"Chancery".
(3. R. 3.).
Fontbl. Eq. 75.

BUT THE COURT was clear in opinion, that the decree should be final, for that in cases of trusts infants are always bound by decrees of this court, and so they are where the will of the ancestor is contested; and it is either set aside or confirmed in equity after trial of an issue *deviseavit vel non*, or where it is otherwise set aside without a trial at law; and there is scarce any case where an infant has time to shew cause against a decree, but where it is necessary for him to join in a conveyance in order to complete the estate, and where such conveyance is of the inheritance, as in decrees of foreclosure of mortgagors, &c. (b).

(a) See Mallack v. Galton, 3. Peer. Cook v. Parsons, 2. Vern. 429. Brook v. Hereford, 2. Peer. Wms. 518. Gregory v. Moleworth, 3. Atk. 626.
(b) See Eooth v. Rich, 1. Vern. 295.

Reeves

Reeves *against* Reeves.

Case 62.

THE father of the plaintiff and the defendant, in consideration of his marriage with their mother, and of a portion in money, did, in the year 1673, article to settle his estate to the use of himself for life, then to his intended wife for life, then upon trustees to preserve contingent remainders, then to the first son of that marriage, and to all and every other the sons, &c. in tail male, with several remainders over, with power to make a jointure to any other wife of a thousand pounds a-year; and a proviso, that it should be lawful for him, by and with the consent of the trustees, to sell the estate, and with the money arising by such sale to purchase other lands, and to settle the same to the like uses as in the said deed dated in the year 1673.

By marriage-articles the eldest son was made tenant in tail: proviso, that the father might sell the lands by the consent of the trustees, and purchase other lands, and settle them to the like uses; he purchased other lands, but did not settle them to the like uses, yet held good.

Afterwards the father sold the lands, and with the money purchased other lands now in question; and in the year 1692, he settled the new purchased lands, by and with the consent of the trustees in the first settlement, to the use of himself for life, remainder to the defendant for life (who by the first settlement had an estate-tail), remainder to trustees to preserve contingent remainders; then to his * first and every other son in tail male, with several remainders over, with a power to make a jointure to any woman he should marry, of the yearly value of six hundred pounds, and soon after the father died.

S. C. 2. Eq. Ab. 719. Post. 165. Cases T. T. 20.

* [129]

Fitzg. 38. 1. Peer. Wms. 622.

Then the defendant, who was his eldest son, in consideration of his marriage, and of a marriage-portion, by deed dated 1698, conveyed the new purchased lands to trustees to the use of himself for life, then to his intended wife for life, then to trustees to preserve contingent remainders, then to his first and every other son in tail male, with several remainders over.

3. Atk. 371. 2. Com. Dig. "Chancery" (3. Z. 11.) (3. Z. 12.).

The defendant, *Thomas Reeves*, having only a daughter, and no issue male by his said marriage, would now sell these lands, alleging, that the remainders limited to the issue male were voluntary, not being within the consideration of the settlement made by him in the year 1698.

Therefore this bill was exhibited by the next in remainder to obstruct the sale, and to oblige the trustees to enter to preserve the contingent remainders; and that the deeds and evidences may be brought into court to know how the title stands; he suggesting, that by the marriage articles of their father, dated in the year 1673, he covenanted to settle his estate as aforesaid, but with a proviso to sell the same by and with the consent of the trustees, and to purchase other lands, and to settle them upon the same uses as in the first settlement, &c.

AND IT WAS ARGUED for the defendant, that the settlement in 1673, made upon the marriage of the father, both of the plaintiff and defendant, though mentioned to be by *articles* only, was and

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is a good settlement by way of *covenant to stand seised*; and that the defendant is by the express words of that settlement made tenant in tail of the lands sold; and the proviso being to settle the new purchased lands to the same uses as in the first settlement, it was not in the power of his father to make him tenant for life by any other settlement whatsoever, so that he must still remain tenant in tail of the new purchased lands; and that settlement made by his father in the year 1692, when he purchased those lands, as far as it crosses the limitations in the first settlement, is entirely void, being voluntary; so that the settlement made by the defendant, in the year 1698, upon his marriage, is good; and such of the lands which are not contained in that settlement the defendant may sell, and the plaintiff hath no right to contest the sale even of * those lands, he being no ways within the consideration of that settlement.

* [130]

ON THE OTHER SIDE it was insisted for the plaintiff, that this settlement made by the father, in the year 1692, of the new purchased lands, appears on the very face of it to be made in consideration of the settlement made by him in the year 1673, which though mentioned to be by articles, yet strictly speaking those articles amounted to a *covenant to stand seised*; and the settlement made in 1692 being in execution of that covenant, and acquiesced under ever since it was made, must now be taken as a full and entire execution of that covenant: and though the father could not be compelled by a court of equity to make the defendant tenant for life, who by the first settlement was tenant in tail; yet the father having of his own accord, and with the consent of the trustees, made this settlement, and no objection made to it during his life, the defendant shall not be admitted to say it is not good, it not corresponding with the proviso in the first settlement. This is not like the case of *Wakely v. Wakely*, where the father, on his intermarriage, &c. articulated to convey his estate to the use of himself and his wife for life, remainder to the heirs of their two bodies; and afterwards he had issue a son, who coming of age, the father by his last will, which he mentioned to be in execution of the articles, devised the estate to his son for life, remainder to his first and every other son, &c. in tail male, with several remainders over, and afterwards the son brought his bill in this court to be relieved against this devise, it not corresponding with the articles: and the Court declared, that though by the equity of the *articles* the son should be tenant in tail; and if he had sued in this court to compel the father to an execution of the said articles, the Court would have decreed an estate-tail to him; yet if the father, by the consent and approbation of the trustees, had made such a settlement, this Court would never set it aside. But in that case the father had done it by his last will, without the consent of the trustees, and without the consent of the son, who was then of age; and by that means the son having no power to make a jointure, or any charge

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charge on the lands to make provision for younger children, that devise was set aside. But in the principal case, the settlement in 1692 was made by the consent of the trustees in the first settlement, which * is therefore good, and a full execution of the covenant in that settlement. And so is *Matthews's Case*, who by his father's marriage-articles was made tenant in tail; but some time afterwards the father made a settlement by which *Matthews* was made tenant for life, with a power to settle a jointure of six hundred pounds a-year on any woman he should marry; and being about to marry, it was the opinion of several eminent lawyers he could make no greater jointure; for though he was tenant in tail by the articles, and if it rested there, he might have made what jointure he thought fit; yet being tenant for life by a subsequent settlement varying from the articles, he could not make the jointure beyond six hundred pounds a-year; and thereupon he applied to the parliament, and obtained an act to make up the jointure a thousand pounds a-year, but that his estate in possession, and all the remainders over, should continue as before.

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* [131]

Next THE COUNSEL for the plaintiff cited the case of *Burton v. Hastings (a)* in this court, which was thus, viz. By the marriage-articles, the wife's estate was to be settled on the husband and wife, and on the heirs of their two bodies to be begotten; and afterwards it was settled to the use of the husband and wife during their lives, remainder to the first and every other son of the husband in tail male, remainder to the heirs of the body of the wife; they had no son, and but one daughter; the husband died, and his widow married again, and then the husband and wife joined in a fine, and settled the estate to other uses; thereupon the daughter exhibited her bill, and prayed relief on the articles, because by the equity thereof the husband and wife ought to be but tenants for life, and the subsequent settlement could not enlarge the estate of the wife to an estate-tail general, viz. to her and the heirs of her body; but she had no relief, the Lord Chancellor COWPER declaring he could not relieve against the settlement; though if it rested on the articles, without any settlement made, he would have decreed, that the articles should be carried into execution.

It was farther insisted for the plaintiff, that he was proper in this application, and had reason to pray the aid of this court; and for that purpose a case was cited between *Sir Richard Mead* and the *Lord Kerry*, which was thus, viz. The late *Lord Kerry*, in consideration of a marriage and a marriage-portion, settled his estate to the use of himself for life, then to trustees to preserve contingent remainders, * then to his first and every other son in tail male, &c. and before he had any issue, he borrowed money of the plaintiff, and for securing the repayment thereof with interest, he

* [132]

(a) Eq. Abr. 393. pl. 4. Gilb. Eq. Rep. 113.

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levied a fine, &c. And upon a special verdict found in the cause, the question was, if the charge was good against the present lord; for that on his father's levying the fine, the trustees did not enter to preserve the contingent remainders; so that it is very proper that the plaintiff in the principal case should come into this court to compel the trustees to enter, in order to preserve the contingent remainders, especially since the plaintiff is a purchaser under the settlement made in the year 1692, for that his father, who made that settlement, had thereby abridged his power of charging the estate with a thousand pounds a-year, which by the settlement made in the year 1673 he had power to do.

THE COURT. Every remainder-man has a right to come into this court, and pray the aid thereof to compel persons to bring in the deeds and evidences relating to the estate; but this is a bill of the first impression as to the prayer for the trustees to enter to preserve contingent remainders, for their title is merely at law; neither doth it appear in the cause, that the trustees refused to enter. Now if this case is considered upon the deed made in the year 1673, the defendant is tenant in tail of the lands thereby settled; but the deed made 1692 of the new purchased lands was intended to be a family settlement, and a full execution of the covenant in the deed made 1673, by which deed the defendant being made tenant for life, he shall not be at liberty to incumber any part of the lands thereby settled by his father; therefore the decree was for the plaintiff.

And in pronouncing this decree THE LORD CHANCELLOR said, that where a settlement is made by the father, or other lineal ancestor, in consideration of the marriage of his son, in such case all the remainders limited to his children and their posterity are within the consideration of that settlement; but when it is made by a brother or any other collateral ancestor on his intermarriage, there, after the limitations to his own issue, all the remainders limited to his collateral kindred are voluntary, and not within the consideration of the marriage-settlement.

* [133]

Case 63.

* Southwell against Lord Limerick.

Depositions
taken *de bene esse*,
and before the
defendant had
put in his an-
swer, or issue
joined.

S. C. 2. Eq. Ab.
418.

THIS was a bill to redeem a mortgage made in the year 1636; and upon a motion for publication of the depositions,

THE QUESTION was, Whether a deposition taken *de bene esse* on a commission formerly issued to examine witnesses, and taken before the defendant had answered, or issue joined in that cause, should be now read at the hearing of this cause? and according to the resolution in *Brown's Case* (a) it ought not. The case was thus: Upon a bill in THE EXCHEQUER to preserve the testimony of witnesses, one T. S. being a witness, and sick, was upon hearing

(a) Hard. 315.

Hilary Term, 11. Geo. 1. In Chancery.

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against
LORD
LIMERICK.

of Counsel on both sides, and by order of Court, examined *de bene esse* on the part of the defendant. Afterwards on the twenty-eighth of November, the answer came in, and the witness died on the eighteenth of December following; and by the opinion of all the Judges, it was held, that his deposition could not be read in evidence at a trial in law, in ejectment, because it was taken before issue joined, and he lived long enough after the answer came in to be examined in chief. Where there is no default in the defendant, a deposition taken *de bene esse* on behalf of the plaintiff, and the witness dying soon after such deposition taken, it shall not be read; but in the principal case that reason fails, for the plaintiff was kept out of the answer by the defendant for above two years by privilege of parliament, and other delays; and the commission to examine in chief was taken out in July last; and by affidavits made in this cause it appears, that this witness, who was examined *de bene esse*, was on the fifteenth day of June (before the suing out any commission) struck blind, and lost the use of her memory, and soon after died: but if she had lived, she could not have been examined, for the reason before mentioned; therefore as this delay was occasioned by the defendant, it was insisted, that this deposition taken *de bene esse* might be read at the hearing this cause, and published with the rest of the depositions.

IT WAS SAID *on the other side*, and admitted to be true, that where the delay is made by a defendant, so that a witness cannot be examined in chief, he either losing his memory, or dying before he can be examined in chief; in such case, * his depositions taken *de bene esse* may be read: but if the delay is on both sides, they shall never be read against the defendant, because he loses the benefit of cross-examining the witnesses. Now in this case there was a greater delay made by the plaintiff than by the defendant, for the bill was filed against him whilst he was in Italy and Spain, on his travels, and as soon as he returned in December, &c. he put in his answer, which was filed the tenth of February following; and from that time to the twenty-eighth of April, which is about eight weeks, the plaintiff did not think fit to reply; but as soon as his replication came in, the defendant rejoined, and on the second of June gave commissioners names to the clerk of the other side; but the plaintiff did not join in commission till the twenty-eighth day of the same month, so that the greatest delay was on his side. So where the mother was examined *de bene esse*, and lived eight months after, in which time she might have been examined in chief, but she died without being examined, it was held, that her depositions *de bene esse* should not be read in evidence.

For the defendant.

* [134]

At the same time it was moved, that the publication of depositions *in perpetuam rei memoriam* might pass, and they might be read on the hearing this cause, the witnesses being since dead.

THE COURT. It is the work of another day, to determine whether those depositions may be read in evidence or not.

Therefore

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Therefore no opinion was given as to that matter :

BUT IT WAS ORDERED that publication should pass, and that if the plaintiff thought fit, he might make this objection in proper time.

† In *Hilary Term*, in the second year of *George the Second*, this case was solemnly argued before LORD KING, Lord Chancellor, assisted by LORD RAYMOND, Chief Justice of the king's bench, and SIR ROBERT EYRE, Knt. Chief Justice of the common pleas : and it appearing in the cause, that the defendant had kept the complainant out of an answer, and that the process of contempt were all run out against him before he answered ;

THE COURT and JUDGES were unanimously of opinion, that the depositions taken *de bene esse* on the commission formerly issued to examine witnesses, and which were taken before the defendant had answered, should now be read and given in evidence, though the defendant lost the benefit of cross-examining.

EASTER

E A S T E R T E R M,

The Eleventh of George the First,

I N

The Year

1724,

I N

The Court of Chancery,

I N

Ireland.

West, Lord Chancellor.

* [135]

Case 64.

* Morgan against Dillon.

UPON A PETITION to have the three children of *Sir Arthur Shean* removed from the defendant *Dillon*, and to be delivered to the plaintiff, or to some other person whom the Court should appoint ;

THE CASE was thus :—*Sir Arthur Shean* being seised of a considerable real estate, and being likewise possessed of a great personal estate, married the plaintiff *Morgan's* daughter, by whom he had issue three children ; and being advanced in years, and his wife a young woman, he devised his real estate to his three daughters, and their heirs, and by his will appointed his wife to be their guardian ; and he devised a hundred pounds a-year to each of them during their infancy, for their maintenance ; and two parts of all his personal estate to his said three children, and the third part to his wife. About three hours before his death, the said *Sir Arthur Shean* made a codicil by which he confirmed his will, but devised his real estate over to his wife, in case his three children should die with-

The husband devised his real estate to his three daughters and their heirs, and then by a codicil he devised it to his wife, if his three children should die without issue, and made her GUARDIAN to his children, and died ; she married again ; the guardianship was taken from her by the Court.

S. C. 11. Viner,

Ab. 432. S. C. 2. Eq. Ab. 453. 487. S. C. 3. Bro. P. C. 341. 2. Com. Dig. "Chancery" (3. O. 3).

out

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out issue of their bodies, and soon after died; and about six months after his death his widow married the defendant *Dillon*.

In the argument of this case there were two points very well debated, which though in *Ireland*, yet seem very useful to explain the law concerning guardians.

* [136]

* FIRST, Whether this lady, who was a testamentary guardian, was removable by the Lord Chancellor.

SECONDLY, Whether her marriage with the defendant *Dillon* is such an act as will amount to a breach of that trust reposed in her by the testator, so as to render her incapable of such trust, and to be removed by this Court on account of the marriage, and the remainder limited to her in fee on the death of the three children without issue.

AS TO THE FIRST POINT,

IT WAS ARGUED *for the plaintiff*, that this lady being to enjoy the estate on the death of these children without issue, it would be dangerous to continue her in the guardianship, especially since she is married to a young gentleman, who in her right will be guardian to them, and whose children by her will be entitled to inherit this remainder; therefore it is certainly in the power of this Court to remove a testamentary guardian in cases of such unforeseen accidents. The civil law, which the testator understood very well, ought to be the rule in this case: now, by that law, if the mother of infants marry a second husband, the education of her children may be taken from her (a).

IT WAS ARGUED *for the defendant*, that this lady being a testamentary guardian, according to the statute 12. Car. 2. c. 24. by which it is enacted, "that the parent of a child under age, and
" not married, may by deed or will dispose the custody of such
" child, for and during such time as the child shall remain an in-
" fant, or for any lesser time, to any person other than a popish re-
" cufant; and that such disposition shall be good against any per-
" son claiming the custody of the child as guardian in focage, or
" otherwise; and that the person to whom it is disposed may main-
" tain an action of ravishment of ward or trespass, against any other
" who shall wrongfully take away or detain such child, for the re-
" covery of the child, and shall recover damages for the use of
" the child. And the person to whom it is disposed shall and may
" take into his custody the profits of all the infant's lands, and the
" management of his personal estate till his age of twenty-one
" years, or any lesser time, according to such disposition, and may
" bring actions in relation thereunto, as by law a guardian in com-
" mon focage might do." That this Court could not remove such guardian, unless guilty of some misdemeanor, which might render her incapable * of performing the trust reposed in her: and as to

* [137]

(a) 1. Domat, 270.

the objection, that her second marriage will make her incapable; it is probable it may be so by the civil law, which will not hold in this case, because this lady was appointed guardian by the will of the father of these children, and by virtue of a statute which gave him power so to do; and the testator, at the time of making his will, saw all the inconveniencies which are now suggested in behalf of the plaintiff; for he must necessarily presume this guardian, being very young, would marry again; nor can the presumptions of ill-nature, or destroying the infants, be applied to a mother, as they might to another who is next of kin, because it must be presumed, that whatever parents can get will be for the benefit of their own children. Now, since the testator has, by this appointment in his will, adjudged the mother to be a proper person to be intrusted with the education of her own children, a court of equity will not break through such a will; for that would be to make a new will after the death of the testator. It would likewise be a breaking through that power which the subject has purchased at a great rate, and that is by settling a perpetual revenue of tonnage and poundage on the crown, in consideration of taking away the court of wards and liveries, and turning all the old tenures into free and common socage, and to prevent disputes which might be made by disposing by will or otherwise lands held in knight's-service, giving men power to dispose the custody of their children during their minority, which is a privilege that cannot be taken from them since the making that statute, which is plainly implied by the words of the statute itself; for power given to parents to dispose their children to any person except to popish recusants, is an implication, that any other person who is appointed to be guardian by virtue of this statute, cannot be removed by this Court. It is true, where there is a guardian by *the common law*, a court of equity may interpose; but where by *the statute*, it cannot (a): as for instance, the testator devised the guardianship of his son to his mother-in-law, and died; afterwards the widow married a servant, and being poor, the uncle of the child got the possession of the infant, and sent him beyond sea; but the Court ordered him to restore the child to the guardian (b), for that they could neither remove the child or the guardian, but would make her give security * not to marry the infant without first acquainting the Court (c). And as a guardian is not removable, so the guardianship is not assignable; neither shall it go to the executor or administrator of the guardian (d), because it is a personal trust reposed in him, and therefore not to be determined but by his death.

* [138]

AS TO THE SECOND POINT,

IT WAS ARGUED, that the marriage of this guardian did not make her incapable of the guardianship, because, as it hath been

(a) 1. Peer. Wms. 703. 2. Com. 110. Cases T. T. 58. 2. Com. Dig. Dig. "Chancery" (304.) (3. O. 5.). "Chancery" (3. O. 3.).
(b) 3. Salk. 177. 2. Cal. Ch. 237. (d) Redell v. Constable, Vaugh. 180.
(c) 2. Cal. Ch. 238. 2. Peer Wms.

already

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already observed, it is a personal trust reposed in her, and the marriage cannot be an assignment thereof, because it runs in personal privity; and therefore it cannot be forfeited by the attainder or other misdemeanor of the husband: it is like the case where a *feme sole* was made trustee, or where she has goods as executrix or administratrix, her marriage is no reason to remove her from such trust or executorship. Now, if the devise of the guardianship to this lady should be void, the maintenance devised to her children would likewise be void, and then she would be guardian to these children by nature, and certainly her marriage, without some other default, would not have determined such guardianship; and there cannot be any convincing reason why it should be determined by her marriage, now she is a testamentary guardian, than it would have been if she had been a guardian at common law; for the devise of the remainder in fee to her cannot be any objection upon this statute: for at common law, the lord, as guardian in chivalry, would have the wardship of the body and the lands; though if the ward had died without heirs, he was to have his lands by escheat; in which case it cannot be denied but the lord was to have some benefit by the death of the ward, as the guardian is to have in the principal case, if her children should all die without issue. The limitation of such a remainder to a guardian would have been no objection at common law to remove her from the guardianship, for if it should, it must arise from a presumption, that the guardian may destroy the child; but in this case neither the testator, nor any other person, could or can presume that the mother would destroy her own children; but any man might imagine she would marry again, being young and in the prime of her youth. Now, the reason of removing a guardian at common law is, because the guardianship might be cast on one who is worth * nothing, or an idiot or madman; and therefore it was reasonable that this Court should interpose, and grant relief to the infant, by appointing a guardian who might educate him suitable to his degree and quality; and this statute was intended to remedy those inconveniencies by giving the parents power to ascertain the person, and to appoint such a person to be guardian to their children in whom they could best repose that trust; which appointment is not like a bare power, but it is coupled with the greatest interest which a parent hath in his children; therefore such a guardian is not to be removed by this Court.

* [139]

THE COURT. There are two points in this case:—FIRST, Whether this Court can remove a *testamentary guardian*. SECONDLY, as this case is circumstanced, Whether there is a sufficient foundation for this Court to remove those children from the custody of the defendants, if they are removable at all.—At common law, before the statute 32. Hen. 8. c. 46. by which the court of wards and liveries was erected, THE LORD CHANCELLOR was the sole Judge of wardships; but with this difference, that where they were lucrative to THE CROWN, there the LORD

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TREASURER acted, who had a concurrent jurisdiction with THE CHANCELLOR; but where wardships were not lucrative to THE CROWN, but only for the benefit of the ward, there THE CHANCELLOR alone had the disposition and management of the ward; therefore as the law now stands, the *onera feudorum* being extinct, and the court of wards abolished, and all the old tenures being turned into free and common socage (a), all wardships which are beneficial for the wards must return to this court, as to their original fountain (b). It is true, there were some statutes which altered the common law as to the persons of wards; as for instance, A guardian in socage, or in chivalry, had the custody of the person at common law; but by the statute of 4. & 5. Edw. 6. c. 8. it appears, "that the father of any maid or woman-child unmarried, and within the age of sixteen, might by his last will and testament, or by any other act in his life-time, appoint, assign, bequeath, give, or grant the order, keeping, education, or government of such maid, or woman-child, but not of the males;" probably, because the females are more exposed to contingencies than the other. * That statute related only to the persons of infants, but the statute 32. Hen. 8. c. 1. of Wills, relates to their lands: for whereas before that statute a guardian in socage had the custody both of the person and lands of the ward; now by that statute, the father had power by his last will and testament, or by any act lawfully executed in his life-time, to dispose all his lands held in socage at his free will and pleasure. And by virtue of that act, fathers did usually devise their socage lands by will to some persons in trust, for the heir during his infancy; and by this means the guardian in socage perceiving there was no benefit to be had by the guardianship, very often declined it; so that the heir was without any guardian; which being a very great inconveniency, was intended to be remedied by the aforesaid statute 12. Car. 2. c. 24. which gave the father a power, either by deed or will, to appoint a guardian; but this was only as to the *modus habendi*, for it gave the guardian (thus appointed) no new authority which he had not before; it does not describe his power, but explain its prevalency against guardians in socage, who were the next of kin, to whom the inheritance could not descend, and who claimed the guardianship before this statute was made. The spiritual court might appoint a guardian to an infant (c) who had only a personal estate; but where he hath such an estate, and also lands, such an appointment is void. This Court might likewise appoint a guardian where there was not a rightful one before, and even where there was a real as well as a personal estate; and could remove such guardian, though made by the appointment of this court, if he afterwards became not fit or improper to be a guardian; but a rightful guardian was not removable *ad libitum*, as guardians appointed by this court or by the spiritual court might. A statute guardian

* [140]

(a) See 12. Car. 2. c. 24.

(b) 2. Cal. Ch. 136.

(c) Bishop of Carlisle v. Wells,
2. Lev. 162.

may

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2. Chan. Cases,
237.

• [141]

may be likewise removed for a just cause; and for this there is a plain authority in *Sid.* 424. which was but nine years after the making the statute; and contemporary expositions have been always thought the best method of explaining the meaning of statutes. Now in that case it was held, that a statute guardian might be removed; which shews, that it hath been admitted even in a court of common law, that a testamentary guardian is under the control and inspection of a court of equity, as superintendant of all guardianships; and in the case of *Foster v. Denny (a)*, * this Court ordered a guardian to give bail; and if such an order is good, it may compel him to do any other act which may be thought necessary for the benefit of the infant. At common law there were four sorts of guardians, and every one of them removable: FIRST, There was a *guardian by nature*, and this was the father, who is the root out of which all other guardians spring; and there are instances where the father hath been removed from the guardianship of his child (*b*), or hath been compelled to give security for the benefit of the infant; and if so, then certainly a derivative guardian may be removed, for he can have no greater privilege or immunity than a primitive and original guardian from whom he derived. And even a guardian in chivalry, who at common law had the wardship both of the body and lands of the ward, might be removed by this Court for any misbehaviour or ill usage of the person of the ward, because a guardian never had any interest in the body of an infant, but for the benefit of such infant; and whenever he misused that interest, this Court could remove the person out of his custody: it is true, as far as such wardships were lucrative, the guardians, as they had an interest by the law, did enjoy the same without the interposition of this Court. There was likewise at common law a *guardian in socage*, which was purely for the benefit of the infant, and accountable to him, and removable by this Court upon any misbehaviour, or obliged to give such security to account as the Court thought proper. There was also a guardian by nurture, and this was the mother; and she was removable as the father, and for the same cause; and so was a testamentary guardian.

• [142]

The next question may be, Whether there are grounds in the present case to remove this testamentary guardian? Now as to that matter, it hath been rightly observed at the bar, that this petition is brought *quia timent*; but in this case, as well as at common law, there is a difference between a wardship as it works upon the person of the ward, and as it works on his estate; for that which operates on the person, must be helped by anticipating the evil, and in such case a remedy is to be sought *quia timent*; for there can be no reparation *ex post facto*, but as it operates on the estates of the wards, a reparation may be made, and an application is proper in this court *ex post facto*; nay, that is the only time for that purpose: as for instance, * The father of an infant being

(a) 1. Eq. Abr. 260. 2. Chan. Cases, 237.

(b) Hardres, 96.
indebted

indebted to the defendant, granted the guardianship of his children to him (the defendant) with a covenant in the deed not to revoke it; the bill was to bring the guardian to account, and to remove him; but because there was a just debt due from the father to the guardian, the Court would not restrain him from receiving the rents of the infant's estate, but only from abusing his person (a). Now, if this Court can interpose in any case where there is a testamentary guardian, why not in this, if it is thought necessary so to do? The proposition is general: Either a guardian can or cannot be removed at all. That he cannot is false, if he can in any one case; and that it can in some cases, hath been already proved by the authorities cited; therefore it may be done in this case. It is true, here is a remainder limited to the mother, and it must be admitted, that at common law this was a good objection to remove a guardian in socage, upon a presumption, that such a guardian who was the next of kin might destroy the ward; but such a presumption could never prevail in the case where a parent was guardian; for it would be a monstrous presumption, that a man should destroy his own child to inherit his estate; neither can the want of good-nature be presumed in this lady towards her own children, so as for any man to imagine she could be guilty of such an act. But she is married, and under the control of her husband, who in her right will be guardian, and his children by her will inherit those lands, if the children by her first husband should die without issue; and how can the mother shew her affection or good-nature to those children who hath nothing for them but what is under the power and control of her husband, and who in reality is guardian, which certainly is going out of the will, and what the testator never intended?

Therefore IT WAS DECREED, that those children should be removed from the mother their guardian, and that the Court would appoint some proper person amongst their relations to receive them; but that the mother should be at liberty to see them as often as she would.

As to the guardianship of the lands there was no decree made, because there was another bill depending as to that matter; but THE CHANCELLOR declared, that a person bred to hardship and penury, and who afterwards makes his own fortune, and keeps it, is more likely to deal fairly with infants, than one born to an estate, and who becomes necessitous by squandering it away; for * such persons rarely retrieve their fortunes, but are always necessitous.

* [143]

But the decree in this case was reversed in THE HOUSE OF LORDS upon an appeal, and *Lady Shean* confirmed in the guardianship (b).

(a) *Lecone v. Shires*, Vern. 442.

(b) But that a guardian appointed by will, purtiant to the 12. Car. 2. c. 24. is within the preventive and controlling power of the court of chancery, see the *Duke of Beaufort v. Pretty*, 1. Peer. Wms. 703. Harg. Co. Lit. 88. note 12,

13, 14, 15, 16. See also *Darcy v. Lord Holdernels*, Trinity Term 1725, coram KING, Lord Chancellor, *Buttler v. Freeman*, Ambl. 302. *Currie v. Hunter*, 1. Peer. Wms. 705. *notis. Ex parte Richards*, 3. Atk. 518.

Case 65.

Webber *against* The Earl of Montrath.

If there was no legal tenant to the *præcipe*, in order to suffer A COMMON RECOVERY; yet after length of time it shall be presumed, that there was a legal tenant.

S C. 2. Eq. Ab. 693.

TENANT IN TAIL (remainder in tail to the defendant) made a lease for ninety-nine years, determinable on three lives, with a covenant that the lessee should renew, &c. and afterwards he mortgaged the lands to T. S. in fee, who assigned the mortgage to one Flower.

Afterwards the lease for lives (which was prior to the mortgage) being determined, the said tenant in tail made a new lease to the now plaintiff, pursuant to the covenant in the first lease, and then he and the assignee of the mortgagee joined in a conveyance of the equity of redemption to one Alcock, in order to make him a tenant to the *præcipe*; and thereupon A COMMON RECOVERY was suffered, in which the tenant in tail was vouched, and he vouched over the common vouchee, and soon after died without issue.

Then the defendant, the *Earl of Montrath*, got this mortgage to be assigned to one *Geering*, in trust for himself, and brought an ejectment on a double demise by him and the said *Geering*.

And thereupon the plaintiff exhibited this bill to stay the proceedings at law; and having got an *injunction*, a motion was made to dissolve it upon coming in of the answer:

But THE COUNSEL for the plaintiff insisted, that it might be continued on the equity confessed in the answer, it appearing that the assignee of the mortgagee did join with the tenant in tail in the conveyance to Alcock, to make him a legal tenant to the *præcipe*: and though it was objected, that this remainder to the defendant could not be barred, because there was no legal tenant to the *præcipe*; yet it was insisted for the plaintiff, that this recovery being suffered in the year 1702, which was now more than twenty-three years past; if he could not shew that there was a legal tenant to the *præcipe*, it must be presumed in his favour (as a purchaser) that after such a length of time there was such a legal tenant.

And if this may be presumed, then the mortgagee, who is a trustee for the mortgagor, and he joining with the (a) *cestui que trust* in suffering this recovery, it shall be a bar to all remainders; and this is proved by the cases cited in the margin, where it was held, that a (b) recovery suffered by * *cestui que trust* in tail barred the intail and all the remainders, and that such a recovery shall have the same effect in a court of equity, and bind the trust in the same manner as it would the estate in law, in case he had the legal estate in him; and as to a fine, it had never been doubted of late, and that even a bargain and sale enrolled by *cestui que trust* of an estate-tail should bind the issue, because such trust is not within the statute *De Donis*.

* [144]

(a) The mortgagor.

(b) 2. Chan. Rep. 78. Vern. 13. 226. 440.
THE

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THE COUNSEL for the defendant insisted, that the plaintiff ought to give a judgment at law, with a release of errors, otherwise the injunction ought not to be continued; for that the defendant being tenant in tail, it would be of some advantage to him to have the legal estate; so as he might dock the intail, and avoid all the remainders over; and then the plaintiff may have the benefit of his title in equity, and make the most of it.

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THE EARL OF
MONTBATH.

THE COURT. None of the cases cited at the bar come up to the present case; for in all those cases the trust covered the whole estate of the *cestui que trust*, as well as of those in remainder: it is true, the case of *Basket v. Pierce* (a) is somewhat like it, which was thus: The testator devised his lands to trustees for ninety-nine years for the payment of his debts; and if they did not act, then he devised the lands to T. S. and his heirs in trust to pay his debts, and afterwards to A. B. in tail, remainder in tail to E. G. Afterwards A. B. who was the *cestui que trust* in tail, levied a fine, and died without issue, and five years passed without any claim: it was decreed, that this fine and non-claim barred the remainder-man in tail, for equitable rights are bound by fines as well as actions and titles at law; and though it was insisted for the plaintiff in that case, that the title of the remainder-man was not yet commenced, because the debts were not paid, and the term for ninety-nine years was subsisting; and that the entire estate at law being in the trustee, he ought to have entered; and that it was against equity for him to suffer the *cestui que trust* to be barred by a fine and non-claim through his default; yet the Court was still of opinion, that the plaintiff was barred.

It is true, in the principal case the mortgagee in fee was a trustee for the mortgagor, but he is only so far a trustee as he derives under the title of the mortgagor, and hath no relation to the remainder over; and to say that the remainder of a legal estate shall be barred by a recovery suffered by a *cestui que trust* of a particular estate, is going farther * than ever that point hath been carried; and seems to cross the intention of the statute *De Donis*, for by that statute this remainder is vested.

* [145]

Besides, this recovery was suffered by a *cestui que trust* in tail, which is but a particular estate, who at that very time had it in his power to have the legal estate, by paying off the mortgage.

It hath been objected, that there was no good tenant to the *præcipe*; but if there had not, it ought to be presumed that there was a good one after this length of time.

It is true, it induces a strong suspicion that the defendant, who is the remainder-man, thought himself barred by this recovery when he brought the ejectment, and declared on a double demise, the one made by himself, and the other by the assignee of the mort-

(a) 1. Vern. 226.

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THE EARL OF
MONTBATH.

gagee, which titles cannot stand together; for if his remainder is good, his title under the mortgage is not; and it is plain, that the plaintiff hath a right to be relieved against any right the defendant can claim under the mortgage:

THEREFORE as to that, a perpetual injunction was decreed for the plaintiff; but as to the defendant's title under the remainder, a trial at law was directed, and after the trial an injunction was ordered till the hearing this cause.

TRINITY

TRINITY TERM,

The Eleventh of George the First,

I N

The Year

1724,

I N

The Court of Chancery.

Earl of Macclesfield, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

* [146]

* Winter against Bermingham.

Case 66.

PETER BROWN being possessed of lands for a long term, which he enjoyed twenty-seven years, by his last will declared, that this term was taken by him in trust for the defendant *Bermingham*, to whom he devised the remainder thereof unexpired, and declared, that it was in pursuance of the said trust, and soon afterwards died.

Thereupon the plaintiff exhibited a bill in this court, suggesting, that both the testator and the defendant *Bermingham* were papists, and consequently by the statute 11. & 12. Will. 3. c. 4. made against the growth of popery, were incapable to take this term; S. C. 2. Eq. Ab. and therefore he, being the next protestant heir, prayed that the residue of the term might be assigned to him.

And in arguing this case, it appearing that the testator, *Peter Brown*, had enjoyed these lands for twenty-seven years, and until the time of his death, THE COURT would not intend this to be a trust, and therefore decreed for the plaintiff, with an account of the profits since the filing the bill.

But IT WAS INSISTED for him, that the account of the profits should be from the time this will took effect, as it was resolved in

Trinity Term, 11. Geo. 1. In Chancery.

WINTER
against
BERMINGHAM.

the house of lords, in the case of *Blake v. Blake (a)*, viz. that a papist must be accountable for the profits since the time of the original purchase.

* [147] * SED PER CURIAM, That decree was made upon some extraordinary circumstances, but that the present decree should be according to the precedents in this court; and denied to give the plaintiff costs (b), for that it was hardship enough for him to lose the lands.

(a) 2. Eq. Abr. 621. 2. Brown. P. C. 387.

(b) When costs shall be given, see 2. Cam. Dig. "Chancery" (2. W.).

EASTER

E A S T E R T E R M,

The Eleventh of George the First,

I N

The Court of Chancery.

Sir Robert Raymond, *Knt.* }
 Sir Jeffery Gilbert, *Knt.* } *Lords Commissioners.*
 Sir Joseph Jekyll, *Knt. Master of the Rolls.*

Boothby against Matthew Vernon.

Case 67.

UPON A BILL IN CHANCERY to set aside a conveyance which was obtained by fraud, and for a reconveyance of the estate ;

Devise to the wife for life, remainder to the issue male of her body, and to the heirs male of such issue male, remainder over ; she had issue a son, who died in her life-time, and then she died ; but she being heir at law to the testator, the reversion in fee descended on her. Decreed, that her husband shall not be named by the custody.

The case was : *Sir Harry Boothby*, by his last will, devised the lands in question " to his sister *Anne Boothby*, and her assigns, for her life ; and that if she married and had issue male of her body living at the time of her death, then to such issue male, and to his heirs males for ever ; but if she died leaving no issue male at the time of her death, then to *George Boothby* and his heirs for ever." *Sir Harry Boothby*, soon after making this will, died without issue, and the said *Anne*, who was his sister and heir, entered, and married with the defendant *Vernon*, by whom she had issue a son and a daughter ; then *Anne* died, and afterwards the daughter died, and the son survived, who afterwards died ; and the plaintiff *Mr. Boothby* is heir at law both to the said testator and *Anne* ; but the defendant, and one *Young* an attorney, fraudulently obtained a conveyance of this estate, which was of the value of seven hundred pounds a-year, in consideration only of fifty guineas.

S. C. 2. Eq. Ab. 727.

THE MASTER OF THE ROLLS, upon the hearing of this cause before him, decreed, that the defendant should reconvey all his right to the said lands to the plaintiff, and that the conveyance which he had thus obtained by fraud should be cancelled and destroyed.

Easter Term, 11. Geo. 1. In Chancery.

BOOTHBY
against
MATTHEW
VERNON.

* [148]

And now upon a petition for a rehearing before RAYMOND and GILBERT, *Lords Commissioners*, IT WAS INSISTED for the defendant Mr. Vernon, that though he took this conveyance knowing it to be fraudulently obtained by his attorney, and so was guilty of imputative fraud, yet that cannot be any ground to take away any right from him which he had before that conveyance * was executed; and a right he had (*viz.*) to be tenant for life by the *curtesy of England*, because his wife was seised of the inheritance during the coverture. It is true, it is determined by her death, but it is not necessary the estate should continue after her death to make the husband tenant by the curtesy, if she was seised of the inheritance in her life-time, which by possibility might have continued after her death. And of such an inheritance she was seised before and after the marriage; for though she had an express estate for life given to her by this will, yet there was no immediate remainder which possibly could vest during her life; but the inheritance was limited upon a contingent at her death; and therefore she being heir at law to the testator, it must descend to her till the contingency happen, so that she was seised of the inheritance subject to this contingent; and though that inheritance vanished at her death, yet her husband shall be tenant by the curtesy. But if not, yet he hath some other rights to this estate: as for instance, his son might take the reversion in fee by purchase under this will; and if so, then the heirs *à parte paternâ* will have a title; but if the son took by descent, it is otherwise; and it is probable, the defendant may have some other demands which he may justly make to those lands; therefore, though this conveyance was got by his attorney by fraud, and this may be a fault in him by imputation, yet there is no reason to oblige him to reconvey all his right to the plaintiff. Therefore the fee descending on her even before she married or had issue, and her estate for life being not merged by the descent of the fee, her husband shall be tenant by the curtesy; and so is the case of *Plunket v. Holmes* (a), *Archer's Case* (b), and the case of *Loddington v. Kime* (c); and the case of *Carter v. Barnardiston* (d) was exactly the same case as *Loddington v. Kime*, which received the same determination in the house of lords. All which cases plainly prove, that the reversion or fee-simple does descend to the heir at law, though there is an hiatus or opening for the interposition of the contingent remainders when they happen. In the case of *Puresfoy v. Rogers* (e), the fee descended to the heir till a contingency happened. By the descent of the fee to the devisee Anne, she was seised of the fee; and whenever a *feme* is seised of a fee-simple at any time during marriage, and has issue and dies, her husband shall be tenant by the curtesy, even though she be afterwards disseised, or the same land be recovered against her. Whether the fee-simple descended to

4 Mod. 284.
2 Lev. 39.
3 Keb. 11.
pl 15.
3 Salk. 299.
pl 5.
Pollexf. 481.

(a) 1. Lev. 11. 2. Saund. 380.
(b) 1. Co. R. p. 66.
(c) 3. Lev. 431. 1. Salk. 224.

(d) 1. Peer. Wms. 505.
(e) 2. Saund. 380.—See 2. Bac. Abr.
74. 4. Bac. Abr. 315;

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the heir at law, was the very question in the case of *Carter v. Barnardiston* (a). It will be something odd if the husband should not be tenant by the curtesy, since the plaintiff claims these lands in virtue of the seisin in fee of *Anne Boothby*. So that this decree being, that the defendant shall reconvey generally, without reserving to him that estate for life which he had by the curtesy, for that reason it ought to be reversed. * There is another reason likewise why it ought to be reversed; and that is, it being a point of law whether the defendant is tenant by the curtesy, or not, that point ought not to be determined in a court of equity without a trial at law.

Boothby
against
MATTHEW
VERNON.

* [149]

YORKE, *Attorney General*, INSISTED for the plaintiff, that a reconveyance was absolutely necessary, because the plaintiff can never recover (having conveyed the legal estate to the defendant) until he have a reconveyance; and it is not sufficient to set aside the deed as fraudulently obtained; for if the plaintiff should bring his action at law, and the defendant should give this deed in evidence, it cannot be avoided by pleading the fraud and giving that in evidence; so that a reconveyance being necessary, the question will be, what sort of conveyance. And certainly it must be a reconveyance without reserving any estate for life to the defendant as *tenant by the curtesy*; for though it is a point in law whether he is so or not, yet the Court who made this decree did not determine it without referring it to the court of common pleas, for the opinion of the Judges of that court, and they certified that he was not *tenant by the curtesy*. However, though it is a point in law, it is a point incidentally arising on a cause proper for the jurisdiction of a court of equity; and such points have often been determined in this court. Now after a question in law referred to the opinion of the Judges is by them certified to this court, it is very unusual to speak to it again upon the same head; for if that should be allowed, it would be in vain to refer cases in law to the Judges for their opinion, and to certify to this court what the law is. It is true, in the great case of the *Duke of Norfolk* (b), the *Lord Chancellor FINCH* decreed against the opinion of the Judges; and in the case of *Gore v. Gore* (c), the *Lord Chancellor MACCLESFIELD* ordered the point certified by the Judges to be spoke to again before himself, upon some dislike of the Judges certificate; and his reason was, to give an opportunity that the matter might be finally determined by appeal to the house of lords; but the parties agreed. Now as to the point in law, it is clear, that the wife had but an estate for life by this devise, and that the reversion in fee descended on her; and then the question is, if that is such an estate in possession that the husband may be * tenant by the curtesy; and it was argued, that it was not, for it must be executed in possession, otherwise the husband shall not be *tenant by the curtesy*: as where an estate is given to two sisters and the heirs of their bodies, the

* [150]

Where the husband shall not be tenant by the curtesy.

(a) 2. Eq. Abr. 430. 1. Peer. Wms. 505. 2. Brown. P. C. 1.

(b) 3. Chan. Cases, 1. Pollexf. 223.

(c) Ante, 4.

husband

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BOOTHBY
against
MATTHEW
VERNON.

Cro. Jac. 260.

husband of her who dies first shall not be tenant by the curtesy, because the estate of the surviving sister intervenes (a). Anciently, the reversions of estates depending upon contingencies were adjudged in abeyance: as if a lease for life be made, remainder to the right heirs of J. S. the fee-simple was held to be in abeyance till J. S. died (b). But of later years it hath been resolved, that there shall be some kind of descent in the mean time, till the contingencies happen, yet so as not to destroy them (c). The reversion cannot descend in possession, and consequently the husband cannot be tenant by the curtesy (d). Now here the testator having devised an express estate to his sister for life, and limited contingent remainders upon her death, the fee not being vested in possession in anybody must remain in himself: as where a feoffment is made to T. S. for life, remainder to the right heirs of W. S. in such case, if tenant for life dies before W. S. he who made the feoffment shall have the fee; and it was the constant rule, that where the reversion came to the tenant for life by the same conveyance, there the estate for life was not merged; but if it came by operation of law, as by descent, or by any different conveyance, there it is merged; and so are the cases of *Wood v. Ingersole* (e), and *Harrison v. Bell*, &c.

* [151]

THE COURT. Upon the death of the wife, the contingent estate-tail to her issue began; so that at that time the estate was to commence in possession, and be consummate, because her estate for life, by which it was to be supported, was gone; so that the inheritance being never vested in her during her life, for that reason her husband cannot be *tenant by the curtesy*. And to make this more clear, the intention of the testator is to be considered. Now it doth not appear, that he had any manner of intention that his sister should have any benefit of the inheritance; if he had, then certainly he having the whole dominion over his estate, and who could have moulded it as he thought proper, would have shewed, that he intended she should have the inheritance; but there is not the least sign or badge of any such intention; and if it shall be otherwise intended by operation of law, that would be an injury done to the intention of the testator. Wherever the estate is to be determined by express limitation or condition upon the death of the wife, there the husband shall not be tenant by the curtesy: as where an estate for life is limited to a woman, remainder to her first and every other son in tail male, remainder to the heirs of her body, remainder to her right * heirs; here it is plain, that she is seised of the inheritance; yet if she hath a son, her husband shall not be *tenant by the curtesy*, because the contingent estate which is to arise upon her death intervenes between her estate for life and the inheritance. Agreeable with the case before mentioned is THE YEAR-BOOK 1. *Edw. 3. pl. 14, 15.* which is, Tenant for life,

(a) 2. Roll. Abr. 90.
(b) Co. Lit. 183. a.
(c) Co. Lit. 342.

(d) Plunket v. Holmes, 1. Lev. 11.
(e) Vent. 345. Cro. Jac. 260.

remainder

Easter Term, 11. Geo. 1. In Chancery.

remainder in fee, &c. ; the tenant for life made a lease to him in remainder for so many years as he (the remainder-man) should live; then tenant for life died, and so did the remainder-man: it was adjudged, that his wife should not be tenant by the curtesy, because the possibility which the tenant for life had that the estate might revert to him, had barred her of all right of dower.

BOOTHBY
against
MATTHEW
VERNON.

45. Edw. 3. 16.

For these reasons THE DECREE WAS AFFIRMED, without any allowance on account of the *tenancy by curtesy*; and as to any other legal interest the defendant had, he might assign it to trustees, but not to be given in evidence till the plaintiff recovers against the defendant; and as to any equitable demand that may be affected by this decree, that the defendant shall reconvey without prejudice to such right.

Charles and Others against Andrews.

Case 68.

THIS was a bill brought against the heir and executors of *John Andrews*, deceased, by the plaintiffs, who were his creditors on *simple contract*, for an account, and to have their debts paid.

If executors pay specialty debts secured on the real estate out of the personal estate of the testator, the simple contract creditors shall have the securities.

The case was thus :

The executors of this *John Andrews* had paid away his personal assets in satisfying debts by specialty, which were a lien at law on his real estate; and by the constant course of this court, where such debts are discharged out of personal assets (as these were), in case of the lands, then the creditors by simple contract shall stand in the places of the creditors by specialty, to have their debts satisfied out of the lands.

S. C. 2. Eq. Abr. 37.
1. Vern. 455.
2. Vern. 273.
763.
2. Com. Dig. "Chancery"
(2. G. 4.).

And so IT WAS DECREED in this case, and that the lands should be sold for that purpose; and the heir, who was an infant, to join in a conveyance within six months after he comes of age.

* [152]

But as to the sale of the lands another question arose, and that was, that the widow of the said *John Andrews* might keep to that jointure which was settled on her before marriage, and relinquish her dower, or at least be obliged * to chuse one, and to relinquish the other, and that she might not have both; for though the jointure which she had by her marriage-settlement is not expressed to be "in bar of her dower," yet it is the rule of this court, that she shall not have both.

If a husband make a settlement on his wife in consideration of a marriage-portion, the wife shall be endowed, if it be not expressly stated in the deed to be "in bar of her dower."

THE COURT was of opinion, that if she was a party to the settlement, and of age at the time of her marriage, and it is expressed that her jointure shall be in bar of her dower, then she shall be barred; but if it is not so expressed, it shall never be averred to be in bar of her dower; and so is *Vernon's Case (a)*. And so was the

2. Vern. 365.
3. Atk. 8. 607.
2. Com. Dig. "Chancery"
(3. E. 2.).

(a) Dyer, 317. a. S. C. Bendl. 210. S. C. 4. Co. 1.

case

Easter Term, 11. Geo. 1. In Chancery.

CHARLES
AND OTHERS
against
ANDREWS.

case of *Lawrence v. Lawrence* (a), in the house of lords, in the year 1717, where it was so held, though the settlement was in consideration of a portion in marriage; but it did not appear the parties intended it should be in bar of dower, which is a different consideration from that of a marriage-portion; therefore nothing but a plain and express intention of the parties shall bar the right of dower (b). It is true, this Court has gone so far as to confine a widow to her election which to take, where a term for years was settled on her in jointure in bar of her dower, though no chattel interest can bar her dower at law, or within the statute; but in regard she expressly consented to accept such an interest for her jointure, this Court would not admit her to have both.

Extravagant
bargain not to be
carried into execution
in a court
of equity.

THEN IT WAS INSISTED for one *Atkins*, who was a creditor by articles made between him and the said *John Andrews* for the purchase of part of his lands, that if the creditors upon simple contract shall now stand in the places of the creditors by specialty, that it may be without prejudice to his demand, and that he might have a specific performance of the articles. It is true, the said *John Andrews* sold the same lands to one *Cropp*; but after the articles were executed for sale thereof to the said *Cropp*, he gave the vendor seven hundred pounds for leave to relinquish his bargain, and thereupon those articles were made void; by which it appears that it was a very extravagant bargain, for otherwise so great a sum would not have been given to relinquish it; and it was insisted on behalf of the defendants, that an extravagant bargain ought not to be carried into execution in a court of equity.

* [153] TO WHICH it was answered, that *Atkins*, the purchaser under these articles, would likewise relinquish the same upon the * payment of the seven hundred pounds to him; for since *John Andrews* had got so much money by *Cropp*, but it was just that *Atkins* should have that money, or a specific performance of his articles.

And THE COURT was of that opinion.

But in regard the defendant was a minor, and by consequence could make no election, therefore THE COURT decreed a specific execution of the articles made between *Andrews* and *Atkins*, for that the sale thereof by virtue of those articles, and in consideration of so much money to be paid for the purchase, was a separate and specific lien on those lands, and this by the constant course of this court; and for so much of the purchase-money to be paid as the lands shall fall short to answer the said *Atkins*, he shall come in as a creditor by specialty on the other lands.

Therefore IT WAS DECREED, that all the lands not settled in jointure, or which might be in dower to the widow, should be forthwith sold, and that the infant should join in the conveyance

(a) 1. Eq. Abr. 218. 2. Eq. Abr. 386. 2. Freem. 234. 3. Vern. 365.
1. Brown's Cases Parl. 591.

(b) See *Tinney v. Tinney*, 3 Atk. 8.
Villa Real v. Galway, Co. Lit. 36. b.
Pearson v. Pearson, 1. Bro. C. C. 292.
within

Easter Term, 11. Geo. 1. In Chancery.

within six months after he should be of age, and THE MASTER to take an account of all the debts, and that the same shall be paid in proportion; and if the lands now to be sold shall not be sufficient to pay all the debts, then the reversion of the widow's jointure or dower shall come in aid thereof, to satisfy what shall remain unpaid.

CHARLES
AND OTHERS
against
ANDREWS.

Soley against Salisbury.

Case 69.

A BILL was exhibited by the creditors of a mortgagor to have the estate sold for the payment of their debts, pending which suit the mortgagee obtained a decree to foreclose the mortgagor of the benefit of redemption.

The Court will open the foreclosure, if there be any unfair conduct in the mortgagee.

THE COURT decreed, that the plaintiff should redeem upon payment of the principal and interest, and costs, to the mortgagee, and referred to A MASTER to take an account thereof, and that the land should be sold to pay the creditors (a).

S. C. 2. Eq. Ab. 600.

(a) See Grefswold v. Marham, 2. Ch. Cases, 170. Godfrey v. Chaldwell, 2. Vern. 601.

* [154]

* Adams against Clerke.

Case 70.

A TESTATOR devised several specific legacies to several persons; and in particular he devised specific legacies to each of his grandchildren, "to be paid at their respective ages of twenty-one years, or days of marriage, which should first happen;" and by a subsequent clause in his will he appointed, that "all the legacies thereby devised shall be paid within one year after his decease."

If legacies be given inter alia to children, "to be paid at twenty-one, &c." a subsequent clause, that "all legacies shall be paid within a year after my decease" shall relate only to the other legacies in the will.

The grandchildren, though under age, and unmarried, exhibited their bill, and insisted, that by virtue of this last clause in the will, their legacies ought to be paid within a year after the death of the testator.

THE COURT. The subsequent clause in this will, which seemingly contradicts the payments of the legacies to the grandchildren in point of time, must be construed so as it may not be repugnant to any former clause in the same will, and therefore that last clause must only relate to the other specific legacies given to the other legatees, and not to the legacies devised to the grandchildren.

S. C. 2. Eq. Ab. 557. 561.
2. Atk. 86. 112.
2. Vezey, 30.
2. Com. Dig. "Chancery"
(3. Y. 12.).

Case 71.

Hill against Filkins and his Wife.

A devise by a papist in trust to papists of lands
 " to be sold for
 " the payment
 " of debts and
 " legacies, and
 " the residue to
 " be paid to A.
 " a papist, when
 " she shall at-
 " tain her age
 " of twenty-
 " one years, or
 " be married
 " with the con-
 " sent of the
 " said truf-
 " tees," is a
 good devise, not-
 withstanding the
 statute 11. & 12.

Will. 3. c. 4. if
 the devisee con-
 forms to the pro-
 testant church
 within six
 months after she
 attains the age of
 eighteen years.

• [155]
 S. C. 10. Mod.
 481. 536.
 S. C. Caf. in Ch.
 22.
 S. C. 2. Peer.
 Wms. 6.
 S. C. 2. Eq. Ab.
 622. 624.
 1. Stra. 267.

THIS was a bill exhibited by a protestant heir for the recovery of lands devised in trust for a papist.

THE CASE was as follows: *Anne Stephenson*, who was grandmother both to the plaintiff and to the defendant's wife, by her last will, in the year 1716, devised the lands now in question to one *Eyre and Bush*, both papists, in trust, to be sold for the payment of her debts and legacies; and the residue of the money arising by such sale she devised to the wife of the defendant, when she should attain her age of twenty-one years, or be married with the consent of the said trustees, and appointed them to be her guardians, and soon after died. The said guardians sent the plaintiff, who was then very young, to a popish school in *Sussex*, and the defendant's wife to another popish school in *Hammer Smith*.

But *Roger Hill*, their father, who was their guardian by nature, petitioned the Lord Chancellor COWPER to have the guardianship of his children, or some other protestant who should be thought proper.

And accordingly an order was made, that they * should be educated in some protestant school; but before that order could be executed, the defendant intermarried with one *Filkins*, at the chapel of THE EMPEROR's Resident, by a priest, and two days afterwards by a minister of the church of *England*.

The defendant confesses by her answer, that she was a papist at the time of making the will, and at her grandmother's death; and for plea faith, that the plaintiff was then a papist; and that she was at that time under the age of eighteen years; and that before she came to that age, she intermarried with the other defendant *Filkins*, who was then, and now is, a protestant; and that she herself became a protestant, and conformed, within six months next after she came to the age of eighteen years, according to the statute in that case made and provided; the words of which statute (a) are thus: "After 29 September 1700, persons educated in, or professing, the popish religion, who shall not within six months after they attain the age of eighteen years take the oaths of allegiance and supremacy, and make and subscribe the declaration of 30. Car. 2. in the courts of chancery, king's bench, or quarter sessions, shall be disabled (but not their heirs or posterity) to inherit, or in any wise to take, any lands, tenements, or hereditaments, within this kingdom; and during the said persons lives, the next of kin who shall be a protestant, shall have and enjoy the said lands until they take the said oaths, without accounting for the profits received, but not to commit waste on penalty of treble damages."—The next clause is, "That after the 10th of April 1700, no papist shall purchase,

(a) 11. & 12. Will. 3. c. 4. s. 5, 6.

" immediately

Easter Term, 11. Geo. 1. In Chancery.

"mediately or immediately, any lands, tenements, or hereditaments, within this kingdom, or profits out of the same, but all such estates or profits out of lands shall be void (a)."

HILL
against
FILKINS
AND HIS WIFE,

Then she insisted, that the plaintiff had no right, he being a papist himself at the time of the making this will, and at the death of the testatrix.

This being the fact, the single question was, Whether this devise of the residue to the grand-daughter shall be accounted as land, and a purchase thereof, within the statute? for if it is, then it is void, and the estate will descend to the plaintiff as heir at law (b).

And as to that point it was said for the plaintiff, that to devise lands for payment of debts, and the residue of the *money arising by the sale thereof to be paid to a papist, this residue shall be taken as lands, and is a purchase thereof within this act, and therefore cannot be taken by a papist; and so it was resolved in the house of lords, in the case of *Roper v. Radcliffe* (c); for otherwise, since nobody else could have any interest therein, such papist might pay the debts and legacies, and enjoy the lands, and by this means the statute would be eluded which was made to prevent their taking lands. [156]

THE COUNSEL for the defendant admitted, that a devise of the residue (as in this case) was a purchase, and within the second clause of this statute; but yet that the defendant was entitled to have an execution of this trust, for that this statute had two views: one was to hinder papists from enlarging their landed interest; the other was to invite them to conform; and the age of eighteen was accounted a proper period for them to make their election whether they would conform or not. Therefore a devise to a papist under the age of eighteen years is good, if he conform within six months after he comes to that age; otherwise the words in the statute which directs when that conformity shall be made are in vain (d); and though he did not conform at the time appointed, yet the inheritance vested in him, and shall descend to his heirs, and he shall maintain an action of waste by virtue of the statute against the next protestant heir, who is entitled to take the profits during the disability. And though the defendant's wife was bred a papist, and professed the popish religion both at the time of the devise and at the death of the testatrix, and likewise at the time of her marriage, yet she became a convert before she was of the age of eighteen years, and had done all which is required by the act, and so is capable to take and enjoy the estate.

(a) See 18. Geo. 3. c. 60. 1. Hawk. P. C. 7th edit. ch. 15. § 5.

(b) *Hawkins v. Chappel*, 1. Atk. 622. *Davers v. Dewes*, 3. Peer. Wms. 46.

(c) Post. 167. 181. 10. Mod. 230.

1. Bro. P. C. 450.—See also *Davers v. Dewes*, 3. Peer. Wms. 46. *Carrick v. Errington*, 3. Peer. Wms. 362.

(d) 3. Peer. Wms. 47.

And

Easter Term, 11. Geo. 1. In Chancery.

HILL
against
FILKINS
ANDRIS WIFE.

And THE COURT was of this opinion; and therefore decreed the trustees to perform the trust.

N. B. On a rehearing before the Lord Chancellor KING, the bill was dismissed with costs.

* [157]

Case 72.

* Robert Barker against Giles and Smith.

Friday, 4th June.

A devise of "all
" my real and
" personal e-
" state to A.
" in trust to
" pay debts and
" legacies, the
" residue to be
" laid out in
" lands to the
" use of B. and
" C. and the
" survivor of
" them, their
" heirs and af-
" signs, for e-
" ver, equally to
" be divided be-
" tween them,
" share and
" share alike,"
creates a joint-
tenancy.

THIS was a bill brought by a surviving legatee to have an execution of a trust.

THE CASE was as follows: *Robert Barker*, seised in fee of the lands in question, by will devised "all his real and personal estate to, &c. in trust to sell the same; and thereout to pay his debts and legacies; and the residue (if the same amounted to no more than four hundred pounds) to be laid out in lands to the use of A. for life, remainder to *Robert Barker* his nephew in fee; and the surplus above four hundred pounds to be also laid out in lands to the use of the testator's nephews *Jerom Barker* and *Robert Barker*, and the survivors and survivor of them, their heirs and assigns for ever, *equally to be divided* between them, share and share alike."

This will was made in the year 1716, and about four years afterwards the testator died, and left a considerable personal estate sufficient to pay all his debts and legacies; but *Jerom Barker*, one of the legatees, died in the life-time of the testator.

And now the plaintiff, as surviving legatee, exhibited this bill against the executors and heir at law of his uncle *Robert*, to have an account of the real and personal estate of the said testator, and to have conveyance of the real estate.

The trustees by their answer submitted to account, and to execute the trust out of the residue of the estate, after debts and legacies paid.

THE QUESTION was, How this trust should be executed? for that the heir at law to the testator claimed a moiety of the estate by descent; and this depending upon the construction of this will, what estate the legatees took by this devise; for if it was a *tenancy in common*, and one of them dying in the life-time of the testator, then his moiety will descend to the heir at law, as undisposed by the will: but if they were joint-tenants, then the whole survives to the plaintiff.

LUTWYCH, COWPER, and TALBOT, for the plaintiff, insisted, that this was a *joint-tenancy*, it being in a will where the intention of the testator is to govern, and where artificial reasoning is not to be admitted against it; and that nothing but an express intention, or a necessary implication of such intention, shall create a *tenancy in common* in a will which would not create such a *tenancy*

S. C. Caf. in Ch
75.
S. C. 2. Eq. Ab.
536.
S. C. 2. Peer.
Wms. 280.
S. C. 3. Bro.
P. C. 297.
See Burn's, Eccl.
Law, 554.

Easter Term, 11. Geo. 1. In Chancery.

ROBERT
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against
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SMITH.

tenancy in a deed. It has formerly been doubted, whether the words "equally to be divided" would make a tenancy in common in a will. *Ratliff's Case* (a) is the first case to that purpose, and was resolved by reason of the intention of the deviser, they not being proper words in law for that purpose, for they do not create a tenancy in common in a deed even at this day. The case of *Fisher v. Wynne* (b), in HOLT's time, was a devise of copyhold lands to the deviser's two daughters, equally to be divided between them, their heirs, and assigns; and the Court was divided in opinion: but HOLT, *Chief Justice*, held the devise to be a joint-tenancy, for that all the words might be fulfilled by a joint-tenancy, and they do not import a several freehold. In the case of *Blisset v. Cranwell* (c), the reason for that judgment, as given in the books (*per TALBOT*), does not support it, and (*per LUTWYCH*) is not law. * Now it is plain, these words would not make a tenancy in common in a deed (d); therefore if such a tenancy is made by this will, it must be by implication; but express words in the same will shall never be rejected to make room for an implication, as the word "survivor" must in this case, if this is a tenancy in common by the subsequent words "equally to be divided between them;" it being first devised to them, and the survivor and their heirs, in express terms. It may be objected, that if both the legatees had survived the testator, they would have been tenants in common; but by the word "survivor," the testator intended a provision, that if either survived, he should have the whole; and that if both survived, they should take by moieties. Now in this case, the legal estate being in trustees, the heir at law can have no pretence that a moiety descends to him as undisposed; therefore by these words in the will the legatees were joint-tenants; and so it hath been resolved in parallel cases: as for instance, where the testator devised lands to *Jane* and *Elizabeth* during life, "equally to be divided," remainder to the right heirs of *Jane*; this was adjudged a joint-tenancy for life (e). *Trin. 6. Anne, Twickerman v. Jefferies*. So a devise to two, "equally to be divided between them, to have and to hold to them and the survivor of them," was adjudged a joint-tenancy (f). So a devise "to his executors, and to the survivor of them," was held a joint-tenancy (g). So where lands were devised to two daughters, "equally to be divided, and to the survivor of them, and to the heirs of the body of such survivor;" this was adjudged a joint-tenancy, and not a tenancy in common (h). Now by the words of this will, the trustees are directed to convey the lands to the

* [158]

(a) 3. Co. 39.—See also Dyer, 25. a.

(b) Comy. Rep. 88. 1. Ld. Ray. 622. 1. Salk. 391. 3. Salk. 206. 12. Mod. 296. Holt, 369. Lilly's Ent. 205. 1. Peer. Wms. 14. 2. Eq. Abr. 535.

(c) 3. Lev. 373. Salk. 226. Comb. 256.

(d) Dyer, 25.—But see Gaskin v.

Gaskin, Cowper, 660. Rigden v. Val-
lier, 2. Vezey, 252. 3. Atk. 371.
Goodtitle v. Stokes, 1. Will. 341.

(e) Twickerman v. Jefferies, Trinity
Term, 6. Anne.

(f) 2. Roll. Abr. 90.

(g) 11. Mod. 108.

(h) Stiles, 211.

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[159]

legatees, and to the survivor of them, and his heirs; therefore the heir at law shall take nothing by descent, this being an executory trust, and the legal estate vested in the trustees. There is a difference between an *immediate devise* and an *executory trust*; for where any-thing is executory, the Court will consider the intention (a). Farther, by a devise "to two and their heirs," they are joint-tenants (b). So a devise to two, without saying more, they are joint-tenants by implication (c); but in this case, the testator has forbidden such an implication by his comment on the devise in these words "equally to be divided;" and the word "survivor" explains his intention to break the descent to the heir at law, and is a conveyance to carry the estate entirely * to the survivor; for otherwise that word must be rejected, which could never be the intention of the testator. And this was the opinion of one of the lords commissioners.

WEARG, *Solicitor General*, for the defendant, argued, that there is no difference in this case between an immediate devise and an executory trust; for it depends now only on the words of the limitation (d). In 2. *Roll. Abr.* 90. the limitation is express, "to the heirs of the body of the survivor." So in *Twickerman v. Jefferies* (e), and *Bale v. Coleman* (f), a devise of lands, though executory, was construed in the same manner as an immediate devise. In that case, after debts and legacies paid, the residue of the personal estate was to be laid out in the purchase of lands to be settled to the use of A. for life, remainder to the heirs of his body; and COWPER, *Chancellor*, on the first hearing, was of opinion, that in a court of equity this should be considered as an estate for life, remainder in tail; but HARCOURT, *Chancellor*, on a rehearing, thought there ought to be no difference, in point of construction, between a court of equity and a court of law: to which COWPER afterwards agreed. 2. *Vent.* 365. *Style*, 434. As the heir at law is favoured in all courts, if any accident in point of fact should arise between the inception and consummation of a will (as it did in this case between the making the will and the death of the testator) to favour his right, in such case he shall take. Now it is allowed, that if both the legatees had survived the testator, in such case they would have taken by moieties; therefore if one of them die in the life-time of the testator, his moiety shall descend to the heir at law, as undisposed by the will; and as in a devise to two the word "survivor" is implied, therefore the expressing that word is of no weight, because if it had not been expressed it would have been implied; but if both the legatees had died in the life-time of the testator, then his heir would have been entitled to the whole, and so he is to a moiety. And this was the opinion of the other lord commissioner.

Cre. Eliz. 373.
Pl. 5.

Style, 434.
3. Lev. 373.

(a) 1. Peer. Wms. 142.
(b) Littleton, sect. 283, 284.
(c) Litt. sect. 281.
(d) Draper's Case, 2. Chan. Cases.
(e) Cases Tem. Holt, 370. 11. Mod.

(f) 8. Viner. Abr. 265. 2. Vern.
670. 1. Peer. Wms. 142. 2. Peer.
Wms. 473.

KING, Lord Chancellor. This devise is to be considered as a devise of a real estate. The rule of construction of wills in this court is the same as in the courts of law, viz. according to the testator's intention appearing by the words of the will, as far as consistent with the rules of law: and every word that can have a construction consistent with law ought to be retained. Had this been an express devise, it had been a *tenancy in common* (a); the meaning of the words must be invariable, and cannot be altered by the accident of one of the parties dying. A devise to two and their heirs is a *joint-tenancy*. If a devise be to A. for life, remainder to B. in fee, and A. dies living the testator, B. shall take immediately. The testator's intent when he made the will was, that the heirs of both his nephews should take. By the act of God, here is a determination of his intention as to one. If the devisees are *joint-tenants* for life, with several inheritances, all the words of the will may be well consistent, which cannot be by any other construction; and if so, the plaintiff will be entitled to the whole for life (b); and after his death his heir to one moiety, and the heir at law of the testator to the other moiety, by the lapse.

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SMITH.

Wherefore he made a decree accordingly (c).

Which decree was affirmed in the house of lords, with an addition, that the appellant may be at liberty to apply to the court of chancery for the profits of the real estate, in case the personal estate shall not be sufficient to pay the debts and legacies (d).

(a) That land devised to two equally, or equally to be divided, creates a *tenancy in common*, see *Prince v. Heykin*, 1. Atk. 493. *Owen v. Owen*, 1. Atk. 494. *Heath v. Heath*, 2. Atk. 122. *Goodtitle v. Stokes*, 1. Wilf. 341. *Gaskin v. Gaskin*, Cowp. 660. *Stratton v. Best*, 2. Brown. C. C. 233. *Jolliffe v. East*, 3. Brown. C. C. 25. *Campbel v. Campbel*, 4. Brown. C. C. 15.

(b) See *Pring v. Clay*, 2 Ch. Rep. 187. *Humphries v. Taylor*, Amb. 136.

Dowset v. Sweet, Amb. 175. *Frewen v. Rolfe*, 2. Brown. C. C. 220. *Baldwin v. Johnston*, 3. Brown. C. C. 455.

(c) See *Burdon v. Suffolk*, 1. Peer. Wms. 96. *Stringer v. Phillips*, 1. Eq. Abr. 292. *Trod v. Downes*, 2. Atk. 304. *Rose v. Hill*, 3. Burr. 1881. *Perkins v. Baynton*, 1. Brown. C. C. 118. *Armstrong v. Eldridge*, 3. Brown. C. C. 215. *Wilson v. Bailey*, 5. Bro. P. C. 388.

(d) 3. Brown's Cases in Parl. 297.

The 6th February, 1719,

I N

The House of Lords:

Thomas Lord Parker, Lord Chancellor.

Sir Joseph Jekyll, Knt. Master of the Rolls.

* John Trevor, and other the younger Children of Sir * [161]
John Trevor, Appellants; Case 73.

AND

Edward Trevor, Esq. Son and Heir of Sir John
Trevor, late Master of the Rolls, Respondent.

SIR JOHN TREVOR, by articles dated the twenty-third
October 1669, in consideration of a marriage then intended
to be had between him and *Jane Puleston*, the widow of *Roger
Puleston*, and of the affection he did bear to the said *Jane*, &c. did
covenant with *William Salisbury, Esq.* and *Sir Richard Lloyd*
(trustees therein named), and their heirs, before the end of two
years then next ensuing, to settle and assure to them and their heirs,
as their Counsel should direct, all that the capital messuage called
Brynkinalt, and other lands therein mentioned in the counties of
Denbigh and *Salop*, being the ancient seat of the family, and all the
estate he then had, either in *England* or *Wales*, about the yearly
value of two hundred and fifty pounds, to the several uses in the
said articles mentioned, viz. to the use of the said *Sir John* for life,
of the body of such heirs male, with remainder to his own right heirs, and that he should stand
seised to the said uses until a settlement should be made, and then, without making the set-
tlement, levies a fine, and afterwards declares different uses; and dies, leaving a large estate to
descend to his eldest son, to whose use no part of the estate was declared under the fine, *14 QUIT*
will decree a settlement to be made pursuant to the uses declared in the marriage-articles.—S. C.
14. Viner. Abr. 572. S. C. 1. Eq. Abr. 387. S. C. 10. Mod. 436. S. C. 1. Peer. Wms. 622.
S. C. 2. Eq. Ab. 475. 505. S. C. 2. Bro. P. C. 122. S. C. 10. Viner Abr. 247. 260. 291. S. C.
13. Viner. Abr. 374. 572. 281. 285.

If *A.* in conside-
ration of marri-
age, covenant to
settle his estate,
within two
years, to the use
of himself for
life, without
impeachment of
waste, with re-
mainder to his
wife for life,
remainder to his
heirs male in tail
special, remain-
der to the heirs

M 3

“ without

In the House of Lords.

JOHN TREVOR " without impeachment of waste ; then to the use of the said *Jane*
AND OTHERS " for life ; and after her death, to the use of the heirs males of the
APPELLANTS, " body of the said *Sir John*, on the body of the said *Jane* to be
AND " begotten, and to the heirs males of such heirs males lawfully
EDWARD " issuing ; and for default of such issue, to the use of the right heirs
TREVOR, ESQ. " of the said *Sir John Trevor* for ever."
RESPONDENT.

* [162] * And for a farther strengthening the said articles, *Sir John* did thereby covenant, that if the uses and limitations therein were not well raised, according to the intent and meaning of the said articles, that he and his heirs would stand and be seised of the premises until such time that a farther assurance thereof should be made, to such use and uses as are therein before declared.

The marriage took effect, and *Sir John* had issue by the said *Jane* the respondent *Edward*, his eldest son and heir, born the fifth of November 1670. and *John, Arthur, Tudor, Prudentia*, and *Anne*, now *Lady Middleton*, the appellants.

But no settlement was made pursuant to the aforesaid articles ; and *Sir John* and his lady (having some prejudice against *Edward*, the eldest son) levied two fines of the lands comprised in the said articles, in the year 1692, unto *Sir John Wynn* and *Edward Vaughan* ; and about seven years afterwards, viz. 29 September 1699, they did by deed declare the uses of the said fines to *Sir John* for life, then to the said *Jane* for life, and after their death, then to *John* his second son, and the heirs males of his body, with the like remainders over to *Arthur* and *Tudor Trevor* successively, remainder to his two daughters, *Prudentia* and *Anne*, and the heirs of their bodies, remainder to the right heirs of *Sir John Trevor* for ever.

And as an inducement to levy the said fines, and to declare the uses thereof, as in the said deed is mentioned, several acts of undutifulness were therein recited (but none proved in the cause), and also the marriage of the said *Edward* with one *Mary Stains*, against his father's consent (who was proved to be born and bred a gentlewoman, and of a sober and virtuous behaviour), which marriage was not until six or seven years after the said fines were levied ; and it was also recited in the said deed, that if the said *Edward* should have the lands comprised in the said articles, then *Sir John* and his lady would be enabled to make provision for the younger children.

Sir John Trevor, when he executed the said deed to lead the uses of the said fines, was seised in fee of several other lands (which he purchased since his marriage), of the yearly value of six hundred pounds and upwards ; and being so seised, he and the said *Jane* did, by lease and release, and fines levied, settle the same, together with other lands which * were the inheritance of the said *Jane*, to the use of himself and the said *Jane* for their lives, remainder to *John* their second son in tail male, remainder in tail to his other children, as in the former settlement.

Afterwards

In the House of Lords.

Afterwards *Sir John* purchased other estates in fee, which upon his death descended on *Edward* his eldest son and heir; and also some small parcel of land comprised in the said articles, which were not settled by the deed in *September 1699*.

JOHN TREVOR
AND OTHERS
APPELLANTS,
AND
EDWARD
TREVOR, ESQ.
RESPONDENT.

The *Lady Trevor* died in *August 1704*; and *Sir John* died intestate 20th *May 1717*; and afterwards some disputes arising amongst his said sons and daughters concerning his real and personal estate, and who should administer, a commission of inspection was awarded; and upon the execution thereof, the said articles were found in a small trunk with some jewels of value, which *Sir John* had deposited in the hands of one *Evan Lloyd* for safe custody; and then *Edward Trevor* the respondent got a copy thereof.

After the death of *Sir John*, his second son *John* entered on the lands comprised in the said articles, under colour of the settlement in *September 1699*, and he and his brother *Arthur Trevor* (who was administrator to his said father) got into their hands all the deeds and writings of all his estate.

Thereupon the said *Edward* exhibited a bill in chancery in *October 1717* against all the now appellants and others; and amongst other things prayed, that the said articles might be brought into court, and to have a *specific performance* thereof, and a conveyance made, as therein mentioned.

THE DEFENDANTS put in their answer, in which *Arthur*, the administrator, confessed, that the said articles were in his possession; and they all insisted, that the same ought to be considered as a complete settlement; and that *Sir John* their father had thereby an estate-tail, which by their fines in 1692, and by the deed to lead the uses thereof in *September 1699*, was docked, and the lands vested in the second son *John Trevor* in tail male, with remainders over; but if the said articles should be looked on as executory, and as an agreement for a farther conveyance or settlement, in such case *Edward* the respondent had other lands descended on him from his father of a far * greater value than those comprised in the said articles, besides his share of the personal estate, which ought to be taken as a satisfaction for the lands agreed to be settled on him by the articles; and for that reason he ought not to have a *specific performance* thereof.

* [164]

Upon hearing this cause in *June 1719*,

THE LORD CHANCELLOR (a) decreed, that *John Trevor*, and all the defendants, should execute conveyances of all the lands comprised in the said articles, and which were by the deed twentieth *September 1699* settled or conveyed to the defendant *John Trevor* (with such remainders over as therein are mentioned), to the use of *Edward Trevor* the respondent, and the heirs males of his body, with the like remainders to *John* the second son, and to

(a) Lord Parker.

In the House of Lords.

JOHN TREVOR AND OTHERS *Arthur and Tudor successively in tail male, remainder to Prudentia and Anne, and the heirs of their bodies, remainder to the right heirs of Sir John Trevor for ever.*
APPELLANTS,
AND

EDWARD
TREVOR, ESQ.
RESPONDENT.

And as to the other lands in the said articles, which came to the said *Edward* by descent from his father, that the said *Edward* should convey them to the use of himself and the heirs males of his body, with the like remainders over to the defendants *John, Arthur, and Tudor Trevor* successively, remainder to the right heirs of *Sir John Trevor* for ever; and for that purpose, that the parties should levy and suffer such fines and recoveries as the case should require, but at the charges of *Edward Trevor*.

Which decree the respondent by his Counsel insisted to be just, for the reasons following:

FIRST, For that by the scope of *the articles*, they were never designed to be a settlement, being only a bare agreement how, and to what uses and purposes the lands therein comprised should be settled: for by the first part thereof *Sir John* did covenant, within two years, to settle and assure the said lands to the trustees and their heirs, as they and their Counsel should direct, to the several uses in the said articles mentioned, and also in the said settlement, as should be agreed on, &c. viz. "to *Sir John* and his assigns for life, without impeachment of waste; and after his death, then to the said *Jane* for life; and after her decease, to the heirs males of the body of *Sir John* on the body of the said *Jane* to be begotten, &c."

* [165] * Nor can the *covenant to stand seised*, in the latter part of the articles, be taken as a final settlement, from the very words and precedent part thereof; for it is only provisional, and to stand in force till a settlement should be made in form, and such a settlement which would answer the intention and agreement of the parties.

Neither can it be presumed, that *Sir John* should have a greater estate than for life; nor that it should be in his power to defeat his heir male of that provision and estate which by the articles were intended to be made for him, because the articles were founded upon the consideration of his marriage, and of the affection he did bear to his intended wife, and to the heirs males of their bodies to be begotten; so that the consideration extends as well to the issue male of that marriage as to the wife. Besides, the estate is expressly limited to *Sir John* for life, without impeachment of waste, which would have been in vain if he had been tenant in tail, because in such case he would have been punishable of waste.

Moreover, the lands are directed to be limited after his death, and after the death of his intended wife, to the use of the heirs males of their bodies to be begotten, and to the heirs males of the body of such heirs males issuing; so that the first words are only a description of the persons who are to take, viz. "the first and other sons, &c.;" and the subsequent words shew what estate they were to take, viz. "to the heirs males of their bodies."

Now

In the House of Lords.

Now these articles could not be effectually performed without limiting the estate over to trustees to preserve contingent remainders, and in such manner, that it might come to the first and other sons of that marriage, and could never be intended to give a power to *Sir John* to defeat his lady of her estate for life, or the first and other sons of that marriage from taking it after the death of the survivor; nor can it be presumed, that the trustees would have agreed to such a settlement.

JOHN TREVOR
AND OTHERS
APPELLANTS,
AND
EDWARD
TREVOR, ESQ.
RESPONDENT.

As to the point insisted on by the defendants, that the respondent *Edward* hath received a full recompence and satisfaction for that estate which he was to have by *the articles*, by his father's suffering his *Irish* estate to descend to him, this is altogether immaterial (*a*), because *Edward*, the eldest son, doth not come for satisfaction or recompence by way of damages, which is quite out of the case, but he claims a right as a purchaser to the specific lands and * tenements comprised in the marriage-articles, and desires that the same may be settled pursuant thereunto; and that against the defendants, who now claim under a voluntary conveyance made to defeat those articles; which conveyance was not made in favour of younger children who had no other provision, for they were otherwise plentifully provided for, the said *John Trevor*, the second son, having an estate of six hundred pounds a-year by the settlement in *October* 1699, and there being an ample provision for the rest by the respective shares of the personal estate of their father.

* [166]

After a long debate, the decree was affirmed (*b*).

(*a*) See *Wilcox v. Wilcox*, 2. Vern. 553. *Bland v. Widmore*, 1. Peer. Wms. 342. *Letchmere v. Earl of Carlisle*, 3. Peer. Wms. 224.

(*b*) 2. Brown's Cases in Parl. 122.— See also *Jones v. Laughton*, 1. Eq. Cases

Abr. 392. *Nandick v. Wilkes*, 1. Eq. Cases *Abr.* 393. *Cusack v. Cusack*, 1. Bro. P. C. 470. *West v. Erissey*, 2. Peer. Wms. 350. *Robinson v. Hardcastle*, 2. Term Rep 252. *Highway v. Banner*, 1. Brown. C. C. 584.

The First of May 1714,

IN

The House of Lords.

* [167]

* Edward Roper, Esq. Appellant ;

Case 74.

AND

Thomas Radcliffe and William Constable, Two of the
Executors of John Roper, Esq. deceased, Respon-
dents.

THE RESPONDENT'S CASE.

JOHAN ROPER being seised in fee of several manors, lands, and tenements, in the counties of *Cornwall, Gloucester, and Monmouth*, did, by lease and release dated the seventeenth and eighteenth days of *January*, in the year 1708, grant and convey the same to the respondents, *William Constable, Richard Snow, Daniel Hickman*, and their heirs, in trust to sell the same, and out of the money to be raised by such sale, and out of the rents and profits until sold, to pay a debt of four thousand pounds to *Hester and Elizabeth Walden*, due to them by a mortgage of the premises, with interest ; and after the said principal sum and interest were paid, then in trust to them for the payment of several debts mentioned in A SCHEDULE to the said deed of release annexed ; and the surplus of the said money to be paid to such person or persons as the said *John Roper*, by writing under his hand attested, &c. or by will, should appoint ; and in default of such appointment, then in trust for the said *John Roper* and his heirs.

Devise of lands to a papist is a purchase within the meaning of the act 11. & 12. Will. 3. to prevent the growth of popery. S. C. post. 181. S. C. 10. Mod. 230. S. C. 2. Eq. Abr. 620. S. C. 1. Bro. P. C. 450. 2. Will. Rep. 5. Stra. 267.

Afterwards the said *John Roper* made his will, dated the fifth of *March* 1708, reciting the said lease and release, and the power reserved to him therein to dispose the surplus of the said money, and devised several money legacies to several of his relations mentioned in the said will ; and the residue of all his real and personal estate he devised to the respondents, * *Thomas Radcliffe and William Constable, Robert Hewitt and Daniel Hickman*, their heirs and assigns, for ever, and made them joint executors.

* [168]

In the year next following, viz. the first of *April* 1709, the said *John Roper* added A CODICIL to his will, and thereby devised several legacies to persons therein mentioned, and all the remain-
der,

In the House of Lords.

EDWARD
ROPER, ESQ.
APPELLANT,
AND
THOMAS RAD-
CLIFFE AND
WILLIAM
CONSTABLE,
TWO OF THE
EXECUTORS OF
JOHN ROPER,
ESQ.
RESPONDENTS

der, whether in lands or in personal estate, he devised to his said executors, *Radcliffe* and *Constable*, the now respondents. And in the same month, viz. the tenth of *April 1709*, the said *John Roper* added another codicil to his will, and thereby devised to the said *Thomas Radcliffe* all his household goods, and power to renew the lease of his dwelling-house if he thought fit; and he devised all his books to the said *William Constable*; and soon after he died.

Then *Thomas Radcliffe* and *William Constable* exhibited their bill in chancery against *Edward Roper*, and against *Snow* and *Hickman*, and others, to have the trust-estate sold, and to have an account of the profits, and (after the debts and legacies were paid) to have the surplus money arising by such sale, equally to be divided between them to whom it was devised by the first codicil.

To which bill *Edward Roper*, the defendant (the now appellant); put in his answer, insisting, that he was heir at law to the said testator *John Roper*, and entitled to all such real and personal estate not sufficiently devised or conveyed by him; and that the respondents, *Radcliffe* and *Constable*, are, and at the time of the testator's death were, PAPISTS, and persons professing the popish religion, and as such were rendered incapable by the statute 11. & 12. Will. 3. c. 4. of purchasing any lands or profits out of lands; and that the appellant is heir at law, and A PROTESTANT, and therefore claimed the benefit of that act, being capable by law so to do; and demanded the judgment of the Court, whether he should be decreed to join in the said sale.

And the other defendants *Hewitt* and *Hickman*, by their answer, insisted, that the real estate devised by the will ought to be considered as the remaining part of the testator's lands, after so much thereof was sold as would be sufficient to discharge all his debts and legacies; and if the other respondents *Radcliffe* and *Constable* were incapable to take them, being disabled by the statute, because they were papists, then the said defendants *Hewitt* and *Hickman*, being the two protestant executors, claimed the same, as being the * only devisees capable to take by virtue of the will; and they insisted, that the first codicil, as it related to a devise of the testator's lands, did not controul the devise of the residue of the testator's lands to *Radcliffe* and *Constable* mentioned in the will; because, if they were incapable by the statute to take the lands by the will as purchasers, they are to be esteemed as persons not in being, and that in such case that codicil was void in law.

But admitting they were capable of taking the remainder by the first codicil, yet that gave them no greater an estate than for life; and if so, then the reversion in fee must come to the defendants *Hewitt* and *Hickman*; and for that purpose they brought their cross-bill, insisting upon this matter, as they had done by their said answer to the original bill; and the several defendants, and the mortgagees, and the creditors, having put in their several answers, and

In the House of Lords.

and the legatees having exhibited their bill to be paid their legacies, all the said causes came to a hearing the twenty-seventh of June 1712, before the *Lord Keeper* HARCOURT, who took time to have the opinion of the Judges before he would make any final decree.

EDWARD
ROPER, ESQ.,
APPELLANT,
AND
THOMAS RAD-
CLIFFE AND
WILLIAM
CONSTABLE,
TWO OF THE
EXECUTORS OF
JOHN ROPER,
ESQ.
RESPONDENTS

And a CASE was stated and argued before the *Lord Chief Justice* PARKER, the *Lord Chief Justice* TREVOR, and *Judge* POWELL; and they likewise taking time to deliver their opinions, they, together with SIR JOHN TREVOR, *Master of the Rolls*, concurred in opinion, that the devise of the residue of his real and personal estate, devised to the said *Radcliffe* and *Constable*, after debts and legacies paid, was a good devise, notwithstanding that statute by which papists are disabled from purchasing lands, tenements, or hereditaments, for the surplus-money is a personal interest in them; and therefore the devise thereof is not void, either by the words or intention of that act.

And an account was decreed of the testator's real and personal estate, and that the real estate should be sold to the best purchaser, to be approved by THE MASTER, wherein the appellant, who was heir at law, should join, he being first paid his costs; and a receiver of the estate was appointed, giving security as usual; and the money arising by sale, together with the profits of the lands till sold, should, in the first place, be applied to satisfy the mortgage of four thousand pounds, with interest and costs, and then the schedule-debts with interest; and then all the other debts standing out and not discharged by the personal estate, and then the * legacies should be paid, with interest and costs, and the creditors were to come in to prove their debts.

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And as to *Hewitt* and *Hickman*, THE COURT was of opinion, that the first codicil, by which the testator devised all the remainder, whether in lands or personal estate, to the said *Radcliffe* and *Constable*, was a revocation of the devise in his will of the residue of all his real and personal estate to *Hewitt* and *Hickman*, and so their bill was dismissed with costs.

From this decree an appeal was brought in THE HOUSE OF LORDS.

And the principal points insisted on to maintain it were: That this devise was no purchase within the statute, because the word "purchase" in that act must be intended where a man is active in it, and not where lands are given to him by a will. That as *Radcliffe* and *Constable* could take no lands by this will, because those were conveyed to trustees, to be sold for the payment of debts and legacies, and the residue was devised to them, that residue is no more than a pecuniary legacy, which they were capable to take, notwithstanding the statute. That it is a standing rule in equity, that lands devised for payment of debts and legacies are to be deemed as money; and that money devised to buy lands is deemed

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EDWARD
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RESPONDENTS

deemed as land; and so it is also of lands or money in the hands of trustees; therefore, as the respondents were under no manner of conviction as papists, they were justly intitled to this residue.

* [171]

BUT IT WAS ANSWERED, AND SO RESOLVED, that this statute intended to abridge the power and interest of *papists*; and if a devise should be construed to be no purchase within that act, then papists would be in a capacity to take great part of the lands in *England*; therefore a devise to a papist must be a purchase, (*i. e.*) to such a papist who was a stranger to the inheritance, but not where a particular estate or interest comes to the heir at law by a devise, for that is but a modification of that estate which would otherwise descend to him, so as he is under eighteen years of age, and conforms within six months after he should arrive at that age. That though lands devised for payment of debts and legacies are to be deemed as money so far as there are debts and * specific legacies to be paid, yet still the heir at law has an interest in such lands by a resulting trust, so far as they are of value after the debts and legacies are paid; and the heir at law may properly come into a court of equity, and restrain the vendor from selling more of the lands than what are necessary to raise money sufficient to discharge the debts and legacies, and to enforce the devisee to convey the residue to him; which residue shall not be deemed as money, neither shall it go to the executors of the testator. Nay, the heir at law in such case may properly come into a court of equity, and offer to pay all the debts and legacies, and pray a conveyance of the whole estate to him; for the devisee is only a trustee for the testator to pay his debts and legacies. This is a privilege which has been always allowed in equity to a residuary legatee; for if he come into court, and tender what will be sufficient to discharge all the debts and legacies, or pray that so much of the lands, and no more, may be sold, than what will raise money to discharge them, this is always decreed in his favour. Therefore, though lands given in trust, or devised for payment of debts and legacies, shall be deemed in equity as money in respect of the creditors and legatees, yet it is not so in respect to the heir at law or residuary legatee; for in those cases they shall be deemed in equity as lands; and if so, then the residue in the principal case being devised to papists, it shall be deemed as lands; and consequently it is a purchase within the statute before-mentioned.

Lands given in trust, or devised to pay debts and legacies, shall be deemed as money in respect to creditors, but not in respect to the heir at law or residuary legatee.

For which reasons the decree was reversed in the house of lords, 11 July 1713 (a).

(a) See the arguments of the Chief Justice in this case, post. 181. and the ensuing case on the appeal of Lord Derwentwater, p. 172.

Monday,

Monday, 16th February,

The Fifth of George the First,

BEFORE

Sir Lyttleton Powys, <i>Knt. Justice,</i>	} <i>Delegates to determine Appeals from the Decrees of the Commissioners of Forfeited Estates.</i>
Tracy, <i>Knt. Justice,</i>	
Sir John Fortescue, <i>Knt. Justice,</i>	
Sir James Montague, <i>Knt. Baron,</i>	
Sir Francis Page, <i>Knt. Baron,</i>	

* [172]

* The Appeal of the Lord Derwentwater.

Case 75.

THE late Lord Derwentwater, the appellant's father, being a Roman Catholic, and tenant in tail male of the lands in question, with several remainders over, did, upon his marriage with the daughter of Sir John Webb, suffer a common recovery, &c. and declared the uses thereof to himself and his heirs; and afterwards by lease and release he settled the said lands to the use of himself for life, then on trustees to preserve contingent remainders, then to his first and other son and sons of that marriage in tail male, with several remainders over.

Afterwards the said Lord Derwentwater was attainted of treason and executed. The appellant his son, being then an infant, put in his claim before the commissioners, and by the opinion of four against three, the claim was dismissed. From this decree of dismissal he now appeals.

* The single question was, Whether a papist, by suffering a common recovery, and having a marriage-settlement, shall be a purchaser within the statute 11. & 12. Will. 3. ? for if he is, then this recovery and settlement are void.

And this depends upon the construction of that statute, by which it is enacted, "That after the 29th of September 1700, persons

A papist being tenant in tail suffered a common recovery, and declared the uses to himself and his heirs; this is not a (a) purchase within the statute 11. & 12. Will. 3. ; for it is no new acquisition, but a modification of the family estate.

S. C. 2. Eq. Abr. 621. Stra. 267.

* [173]

11. & 12. Will. 3. c. 4.

(a) The like determination as to the meaning of the word "purchase," in stat. 9. Geo. 1. c. 7. s. 5. concerning purchasing an estate or interest in a parish, the consideration whereof is under 30l. 3. Burn's Just. 362. 8vo edit. 1766. "educated

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“educated in, or professing, the popish religion, who shall not, within six months after they attain the age of eighteen years, take the oaths of allegiance and supremacy, and make and subscribe the declaration, &c. shall be disabled, but not their heirs or posterity, to inherit or take any lands, &c. in this kingdom, &c.” And, “That after the 10th of April 1700, no papist shall purchase, mediately or immediately, any lands, tenements, or hereditaments, within this kingdom, or profits out of the same, but all such estates or profits out of lands shall be void.”

For the appellant.

THE COUNSEL for the appellant argued, that it was never yet questioned, whether a tenant in tail, being a papist, could suffer a common recovery; for if he could not, then he would be barred of disposing his estate, and from providing to pay his debts, and to make provision for younger children.

That the intent of this statute was, to hinder papists from making new acquisitions, and to prevent the growth of their landed interest, but not to take from them the power of disposing their estates; it was to make new purchases void, but not the alterations or modifications of their own estates.

The word “recovery” is not mentioned in this statute, and there is no word under which it may be comprehended, unless it is the word “purchase;” but it would be a strained construction to make the appellant’s father a purchaser within this statute, by suffering this recovery, and declaring the uses thereof, because a purchaser always comes to the estate by the act of the party; but here the tenant in tail came to his estate by act of law; and therefore a papist will be tenant by the curtesy, and tenant in dower, notwithstanding this statute, because in both these cases, the estate is got by act of law, and not as a purchaser by the act of the party.

Besides, a purchaser must buy the estate of somebody, which in this case cannot be either of the reversioner, or those in remainder, because they are strangers to the recovery, and never executed any conveyance.

* [174]

* Neither can this tenant in tail be a purchaser in respect to the tenant of the *præcipe*, or to the recoveror, because they are only made parties by the direction of the law, and through necessity, and have nothing in reality, but a seisin in fee for an instant.

So that if this recovery should be construed as a purchase, there will be a grantee or donee without a grantor or donor, and the tenant in tail must be a purchaser of himself.

When tenant in tail suffers a recovery, he makes use of that privilege which he has by law of having a power over those in remainder or reversion, which power he executes by suffering the recovery; for it cannot otherwise be done; but it is inconsistent to say, that by this means he purchases the remainder or reversion, when it is only a bar to them to claim the estate; therefore, if it be a bar, it cannot be called a purchase.

Besides,

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Besides, in suffering a recovery, nobody is considered but the tenant in tail ; for if he declare the uses thereof, and if the recoveror should declare other uses, those declared by the tenant in tail are good, and the other void. So if tenant in tail be disseised, and the disseisor and disseisee join in a fine, and they and the cognizee declare separate uses, those which were declared by the disseisee, and those alone, are good ; from which it may be inferred, that the tenant in tail is the only party interested in the recovery or fine, and that the recoveror or cognizee are only made parties through necessity, to keep up the forms of recoveries, which are of so great value in the law, that the *Chief Justice DYER* tells us, that he was not worthy to wear a gown who should speak against them.

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My *Lord Coke*, in his *First Institute*, calls a recovery a common conveyance, and it is a privilege so inseparably incident and annexed to an estate-tail, that the tenant in tail cannot by any means be deprived of it ; therefore if a gift in tail be made on condition that the donee shall not suffer a recovery, this condition is repugnant and void, because the law gives him a power so to do.

1. Inst. fo. 10. a.

1. Inst. 224. a.
6. Rep. 41. b.

In the principal case, if the appellant's father had declared the uses to himself and his heirs, this would not have been a new use but the old one ; so that if he had been seised *à parte maternâ*, and after the recovery had declared the uses to himself and his heirs, in such case the heirs (a) *à parte maternâ* should inherit, and those *à parte paternâ* would not ; and if he had declared no uses, then by operation of * law the use would result to the heirs *à parte maternâ*, and they would have immediately been seised in fee.

* [175]

It hath been pretended, that every alteration of the estate shall be taken to be a purchase within this statute, but it is quite otherwise ; for if a papist is seised of a defeasible estate, and levies a fine thereof with proclamations, and five years pass without any claim, now by this means the estate is become indefeasible ; this is certainly an alteration of the estate, but nobody will say it is a purchase.

So where the father, being a papist, settles his lands upon his son, with a power of revocation, and after he executes that power, so that the estate is revested in the father, this is likewise an alteration of the estate ; but it was never yet called a purchase.

Before the statute (b) *De Donis, &c.* where lands were given to a man, and to the heirs of his body, &c. upon condition, that if he die without issue, the same should revert to the donor ; yet after issue born he had power to alien, and to bar such issue, and all possibility of reverting to the donor, which he could not do before he had issue ; so that the getting a child made a great alteration in his estate ; but no man can say that he became a purchaser by getting a child.

(a) Salk. 590. 3. Lev. 406.
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(b) Westm. 2. cap. 1. anno 13. Edw. 1.
N

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It was not insisted on by the Counsel on the other side, that the Lord Derwentwater could not make any settlement ; for certainly if he had been tenant in fee-simple, this settlement had been good ; but his gaining a fee-simple by suffering a recovery as tenant in tail, and declaring the uses thereof, makes no alteration as to that matter, because a common recovery is a conveyance which a tenant in tail is entitled to make by law, and thereby to do as much as any tenant in fee can do ; and the power of suffering such a recovery is inseparably incident to every tenant in tail, and so closely united to the estate, that as a tenant in fee cannot be restrained by any condition to alien, so neither can tenant in tail from suffering a common recovery.

But the reason of the commissioners decree is, for that the Lord Derwentwater, by suffering this recovery, &c. did acquire a new and greater estate than he had before ; so that by this means he became a purchaser of such estate.

It is true, his estate is new modelled, but not new made ; and take it altogether, he hath a less estate after suffering the recovery than he had before ; for if the recovery, and the declaration of the uses and the settlement be looked upon * as one conveyance (for so it is in law), then instead of an estate-tail he hath only an estate for life ; and there is an express authority, that the recovery and the deed to lead the uses and the settlement, are but one conveyance ; for so it was resolved in the *Lord Cromwell's Case* (a), where the bargain, the recovery, and the fine, though made at several times, yet all being made by the mutual agreement of the parties, were but one assurance, and tended to perfect the bargain.

Where tenant in tail levies a fine, or suffers a recovery, and declares no uses, in such case the use is to him and his heirs (b), for it can never result to him in tail, because that estate is extinguished by the fine, and barred by the recovery ; and therefore this lord having by an express deed declared what is implied by law, this express declaration and deed must be brought under that maxim, viz. *Expressio eorum quæ tacite insunt nihil operatur*.

It hath been said, that if the Lord Derwentwater had been tenant in fee, this settlement had been good ; now if that be admitted, then tenant in tail in some sense hath as large an estate ; for as tenant in fee may by feoffment, bargain and sale enrolled, lease and release, &c. dispose the fee ; so may tenant in tail, by using the proper means he hath by the law, which is by suffering a recovery ; so that though he is not tenant in fee in *actu*, he is so in *potentia* ; and it plainly appears in the Books, that he hath the whole power over the estate in his hands ; for the remainder-man cannot charge it but at the will of the tenant in tail ; for if he suffers a common recovery, all such charges are barred as well as all the remainders, and shall never take place, though the tenant in tail should die

(a) 2. Rep. 70.

(b) See *Machil v. Clerk*, 7. Mod. 28.

without

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without issue; and that is the true reason why a remainder after an estate-tail is of no consideration in the eye of the law, for it shall not be deemed assets in the hands of the heir; and if an action should be brought against him, in such case, *riens per descent* is a good plea for him (a).

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For these reasons it was prayed, that the decree of the commissioners might be reversed.

THE COUNSEL on the other side, who argued against the appellant, admitted several things which were alledged on his behalf; as that tenant in tail hath power of suffering a recovery, and by that means to bar the issue in tail, and likewise all remainders and reversions; and that such power is inseparably annexed to his estate, and cannot be restrained * by any condition; and that where he suffers a recovery and declares no uses, there the use results to him and his heirs; but notwithstanding all this matter, the Lord Derwentwater was a purchaser both within the meaning and letter of this statute. E contra against the appellant.

[177]

It cannot be denied but that the word "purchase" is mentioned in this act, viz. "no papist shall purchase any lands, &c." Then it must be considered, whether this case comes within the legal signification of that word: and as to that matter, my Lord Coke (b) tells us, that every man who has an estate has it either by right or by wrong; if by right, then it must either be by purchase or by descent; so that there are but two ways to have a rightful estate, of which purchase is one; therefore this lord, after he had suffered the recovery and declared the uses, &c. not coming in by descent, it must necessarily follow that he came in by purchase.

In the same Book (c) it is said, that he is a purchaser who comes to lands either by conveyance or title: now this lord came to the lands in question by conveyance, therefore he is a purchaser.

The word "purchase" hath been taken in this sense in other acts of parliament, and particularly in the statute of Mortmain (d), by which it is enacted, that "lands purchased by people of religion shall be forfeited, and that hereafter no purchase shall be made to the use of spiritual persons;" yet if a conveyance of lands is made to them by way of gift, or by will, they were accounted purchasers of such lands.

Words in acts of parliament are always to be understood in that sense the law puts on them: now the design of this law was to put such hardships on papists, that they might be obliged to part with their landed interest, and transfer the same to protestants.

A mortgage made to a papist is void; so that the incapacity of taking lands in any case is meant by this statute; therefore this lord could not alter his estate-tail, and turn it into fee-simple.

(a) See Stapleton v. Stapleton, 1. Atk.

(b) Co. Lit. 2.

9. Goodright v. Mead, 3. Burr. 1703.

(c) Co. Lit. 3.

Tregonwell v. Strachan, 1. Will. 66.

(d) 15. Rich. 2. cap. 5.

2. Stra. 1179. 5. Term Rep. 107. notis.

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The words in this act are very exprefs, viz. "that no papift shall purchafe;" it does not fay for a valuable confideration, but generally without any manner of reftriction; but in feveral ftatutes a diftinction is made between a purchafer generally and a purchafer for a valuable confideration; and if the parliament had intended the latter, it is probable it would have been expreffed in this ftatute.

* [178] * Now in conftruction of acts of parliament it has been an old rule, that every mifchief not exprefsly provided againft is intended to be remedied by the act; and in the cafe of *Roper v. Radcliffe* (a), where the decree in chancery was reverfed in the houfe of peers, it was held, that a devife was a purchafe within the meaning of this ftatute; and if a devife be a purchafe, certainly a recovery and a declaration of the ufes to himfelf and his heirs muft be a purchafe, efpecially when by the ftatute he is capable of taking any ufe; and he cannot take any refulting ufe by implication of law, for that would be contrary to the maxim, *Expreflio facit ceflare tacitum*, and he had plainly expreffed the ufes by the deed.

Now if this lord fhould take by virtue of this recovery and declaration of ufes either expreffed or implied, he would have quite another eftate than what he had before; and the females would inherit, which they could not before; for after making this fettlement, if this lord had iffue a fon, who had iffue a daughter, fhould now inherit, which fhould not do before, becaufe he was tenant in tail male.

As to the objection which hath been made, that if this recovery fhould be adjudged void by virtue of this ftatute it would incapacitate papifts from felling their eftates to proteftants, the anfwer is, that there is no claufe in the ftatute which puts them under fuch an incapacity, the parliament intending it for the benefit of proteftants; and therefore it ought to be taken in the largeft fenfe, and to extend to every conveyance by which a papift fhall take lands as well as to a purchafe for a valuable confideration.

Objection.

It has likewise been objected, that the power of fuffering a common recovery being a privilege inherent to an eftate-tail, it could never be the intent of the parliament to refrain that privilege, efpecially fince the word *recovery* is not mentioned in the ftatute.

Answer.

It is very true, the word itfelf is not mentioned; but as a recovery is a purchafe, it may properly be faid to be within the words of the ftatute, and confequently within the intent thereof; and to prove that a recovery is a purchafe, it was infifted, that as foon as it is fuffered, there is an eftate in fee in the recoveror, and all the ufes arife out of his eftate, and a purchafer, even for a valuable confideration, muft claim the eftate of the recoveror, and not of the tenant in tail who fuffered the recovery.

(a) Antea hic.

Now

* Now the intent of this act was to hinder papists from taking greater and better estates than they had before, viz. from taking a fee-simple where before they had only an estate-tail, and to restrain them from making settlements to perpetuate their estates in their families.

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Where a papist is tenant in tail, remainder over to another, and he in remainder conveys his estate to the tenant in tail, this would be a purchase, and void within this act.

Now in the principal case, the *Lord Derwentwater* got the remainder by suffering this recovery; but the case is the same, whether he got it by conveyance or recovery; for both are void by this statute, which, if it should be otherwise construed, it would be in the power of a papist tenant in tail to bar the remainder in fee in a protestant: and though it may be said, that it shall bar the issue in tail, and the remainders, so that they shall never take any advantage against it; yet the crown being a stranger to the recovery may set it aside, because, in respect of the crown, the estate-tail is *in esse*: so is the case of *Crocker v. Kelsa* (a), where tenant in tail levied a fine, and declared the uses to himself and his heirs, it was resolved, that the estate-tail was barred as to him who levied the fine, and as to his issue; but that *in rei veritate* it was not determined, for all strangers might say that it was in being.

It is true, when tenant in tail suffers a recovery, every one who comes in by such recovery, comes in continuance (b) of the estate-tail, and must be liable to all the charges made by the tenant in tail, and the charges of those in remainder are barred; but this doth not prove, that an estate-tail is as large as an estate in fee, which is the point now in question; therefore if this lord has gained a new and greater estate than he had before, it is plain such estate is void, within the intent and words of this statute.

The question is not, Whether a recovery suffered by tenant in tail shall bar the remainders and contingencies expectant upon such estate? but, Whether he who suffered the recovery shall (after the making this statute) take any advantage of it after it is suffered?

As to the case put on the other side, viz. that where tenant in tail *à parte maternâ* suffers a recovery, and declares no uses, in such case the use shall be to the heirs *à parte maternâ*, this is not law; it is true, it is so where a man is tenant in fee-simple, but not where he is tenant in tail.

* Upon the whole matter it was insisted, that the *Lord Derwentwater* was a purchaser within the words and intent of the statute; therefore it was prayed, that the appeal might be dismissed, * [180]

But the decree of the commissioners was reversed by THE DELEGATES, by the opinion of four against *Justice FORTESCUE*.

(a) Cro. Jac. 688. Hutt. 84.

(b) *Benson v. Hodson*, T. Raym. 236. 1. Mod. 108. 2. Lev. 28.

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BY THE COURT. It is plain, that a papist under the age of eighteen years at the time of making this statute may take either by descent or purchase, and that the word "purchase" in this statute is only a modification of the estate, and shall not be taken in the full extent of the word ; for those purchases are only intended by the statute by which papists enlarge and extend their landed interest, and not where by deeds of settlement the ancient family-estate is new modelled, without making any new acquisition ; so that even at this day a purchase by limitation in a settlement, or by a devise to a papist under the age of eighteen years, is good, so as such papist, within six months after he comes to that age, conform and take the oaths, &c. otherwise he loses the permanency of the profits during his life only.

The Twenty-Eighth of October 1712,

I N

The Court of Chancery.

Sir Simon Harcourt, Knt. Lord Chancellor.

Thomas Lord Parker, Chief Justice B. R.

Sir Thomas Trevor, Knt. Chief Justice C. B.

Sir John Powell, Knt. Justice B. R.

* *The Arguments of the then Chief Justice of B. R.*

Roper against Radcliffe.

* [181]

Case 76.

THE first and great question in this case is, Whether the interest devised by *Mr. Roper* be such an interest, or of that sort as is within the words (or intent) of the statute 11. & 12. *Will. 3. c. 4.*? And herein it will be proper to consider, FIRST, The words of the act. SECONDLY, The nature of the interest.

S. C. ante, 167.

S. C. 1. Bro.

P. C. 450.

FIRST, There are two expressions (or clauses) in the act that concern this point. By the first, "every papist, or person professing the popish religion, is disabled and made incapable to purchase any manors, lands, tenements, rents, or hereditaments in his own name, or in the name of others to his use, or in trust for him." By the second, "all estates, terms, and any other interests or profits whatsoever, out of lands, tenements, or hereditaments, made after the tenth of April 1700, to, or in trust for, the benefit of a papist, &c. are made void." So that all lands, tenements, rents, and hereditaments, are within the first; and "all estates and terms, inheritable or not," and "all other interests or profits whatsoever, out of lands, &c." are expressively within the second. There are no qualifying words to make it material, whether the term or interest be long or short, or what other circumstances it be attended with, provided it be "out of land, &c." And the word "whatsoever" seems to be added on purpose to shut out all pretence of distinction between one "estate, term, interest," or "profit out of land," and another. Now,

In the Court of Chancery.

ROPER
against
RADCLIFFE.

* [182]
Ante, 167.

to the interest devised to *Mr. Constable* and *Mr. Radcliffe*, it is a trust and an interest, and as such it is demanded by their bill. * And of what nature it is, will appear by the deed, the will, and the codicil, whereby it is created and disposed. The creation of it was thus: *Mr. Roper* by lease and release conveys several lands and manors in the counties of *Cornwall*, *Gloucester*, and *Monmouth*, particularly named; and all other his lands, tenements, and hereditaments in those counties, to *William Constable, Esq.* *R. Hewit*, and *Daniel Hickman*, and their heirs, upon trust, as soon as conveniently may be, to make sale of the premises in parcels, or in the whole, to the best purchaser or purchasers, and for the best price or prices that can be reasonably had or gotten for the same; and by and out of the rents and profits arising (thereout) till such sale; in the first place, to pay four thousand pounds owing to *Sir Robert Cotton* and *John Proby*, secured upon the lands in *Cornwall*, with the interest thereof; and then to pay the debts in the schedule, being three debts, amounting to three hundred and ninety pounds. And then "to pay and dispose the residue to and for the benefit of such person and persons, and to and for such ends and purposes, and in such manner as the said *J. Roper*, by any writing, or writings under his hand and seal, testified by three or more credible witnesses, or by his last will and testament in writing so testified, shall direct, limit and appoint; and in default of such appointment, or until such direction, limitation or appointment shall be made, to pay and dispose of such residue or overplus to and for the benefit of the said *J. Roper* and his heirs." And the trustees are declared chargeable only for so much as they respectively shall actually receive. The trust being thus created, *J. Roper* makes his will, and reciting the said deed in pursuance of the said indenture, or by any other power vested in him, he gives, devises, and bequeaths out of the surplus of the money arising, or to arise by and out of the sale or sales of those manors, lands, and premises, and by and out of the rents and profits of the premises arising till such sale, the several sums following; and so disposes of several sums, in all about sixteen hundred pounds, and then goes on: "And as to all the rest and residue of my estate both real and personal, of what nature or kind soever, I give, devise, and bequeath the same to the said *William Constable*, and unto the honourable * *T. Radcliffe, Esq.* *Robert Hewit, Gent.* and the said *Daniel Hickman* equally, and unto their heirs and assigns for ever." And makes them executors. And afterwards adds a codicil, and disposes of one hundred and forty pounds in legacies (though out of the lands), and then goes on thus, "All my remainder, whether in lands or in personal estate, I leave to my worthy and beloved executors *T. Radcliffe* and *William Constable*." The particular times of executing these several instruments appear not; but their dates are near together, viz. the lease and release, 17 and 18 *January* 1708; the will, 5 *March* 1708; the codicil, 2 *April* 1709. So that the trust now contended for, is that trust which *Mr. Roper* reserved to himself and his

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his heirs, in the surplus of the money to be raised by the sale of his lands, rents, and profits, and till sale, after the payment of the several debts and legacies appointed. And it is devised by the will to his four executors, and their heirs, under the title of "the rest and residue of his estate real and personal." And by the codicil to two of those executors, under these words, "all my remainder, whether in lands or personal estate." And there appears no other estate to answer the words "real estate" in the will, or other lands (or personal estate) to answer those in the codicil, but this trust. The lands are not turned into money in his life-time, but remain yet unfold in the hands of the trustees, subject to, and charged with this trust.

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And, **SECONDLY**, THE QUESTION NOW IS, Whether this trust, this right to the surplus, to be received out of those unfold lands, be within this act of parliament? *i. e.* Whether it be an hereditament or an estate, or any interest or profit whatsoever out of lands? (for if it be any of these, it seems clearly within the act.)

This may be considered in two different views :

First, As it agrees with those other sums appointed to be raised by this trust, in this respect, that it is a right to something to be raised out of lands.

Secondly, As it is distinguishable from those other sums, in respect of its being a surplus after the other charges are paid off.

* First, Had this not been a surplus, but a certain sum appointed to be paid out of those lands, it must be admitted to have been within the act; for that says, "any interest or profit out of lands for the benefit of persons professing the popish religion." Now, that it is for the benefit of persons professing the popish religion, is agreed. And, that it is "an interest in (or out of) lands," seems most clear.

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For, *first*, The trustees hold the legal estate in the lands, not at all for their own advantage, but (in the words of the act and of the trust) for the benefit of others.

Secondly, Suppose the executors and legatees, and those who are entitled to the surplus, release to the trustees all their right in the land, it will extinguish this right. And in such case the trustees, who had before only a nominal estate, will then have the beneficial estate too; *i. e.* the whole fee, both legal and equitable.

Thirdly, If they grant all their right, title and interest in those lands, this (interest) will pass.

Fourthly, If they should grant the land itself, it can be no question but this will pass,

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Also we may consider the nature of this interest further, as it is a right to a sum to be raised out of land.

First, The estate and concern of the trustees therein, *viz.*

They have an estate in fee, in trust, to apply the profits, or permit them to be applied for the benefit of the persons to whom the several sums to be raised are appointed to be paid.

First, If there were not an express appointment for them to sell, but that the monies were to be raised out of the profits; they could not sell without consent of him that has the surplus, but must be contented to take the profits as they arise.

Secondly, Though there be an express trust and power to sell, yet it only authorizes them to sell. If, and when they can. And on the best prices, &c. And in the mean time all the profits are in their hands by anticipation; and the trust (or right) is to be managed in the same manner as if to be raised out of the rents and profits only.

* [185] * *Thirdly*, Consider the interest and power of the trustees, *viz.*

They amongst them have the whole trust of the lands, which is a power over the estate therein. And those who are entitled to have particular sums raised, have particular trusts carved out of the inheritance in nature of chattel interests. For,

He that has five hundred pounds appointed to be raised out of an estate of one hundred pounds a-year, has an interest (in the land) of like nature, and much of the same continuance, as if he had a trust (therein) for five years.

If the trustees make not the most of the lands, or suffer not him to do it, they break their trust: A trust to sell being, as I observed before, but in nature of a power to sell. And,

First, Till sale, his right to the profits is the same as if no such power.

Secondly, By sale, his interest in the land is gone, and he now has a trust in the money, and is paid so much the sooner.

Secondly, This trust now in question may be considered as it is distinguishable from the particular sums to be paid out of those profits, in respect of its being a right to a surplus after debts and legacies paid.

And in that respect I think it yet more clearly within the act.

First, Upon the construction of the deed. For thereby it was so vested in *J. Roper*, as to be not only an interest and profit out of lands, but such a one as was an hereditament, and descendible to his heirs, it being expressly reserved to *J. Roper* and his heirs. And it is agreed on all hands, that *Ed. Roper*, the heir, would

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would be entitled to it, if the will and codicil were out of the way.
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If it were merely personal, a limitation to him and his heirs would vest it wholly in him, and it would go to his executors.

Secondly, The constant opinion in chancery. All the cases there, both for and against heirs, who have sued for such surplus, are authorities, that the trust of such a surplus is a real estate, and descendible to the heir of him who created it.

But before I state the cases, I would mention that, which is the ground both of these cases of trusts, and also of the cases of uses executed by the statute.

* AND, first, of uses.

* [186]

A use, before the statute of Uses, was a mere trust cognizable only in equity, and is since expounded in the common-law courts by the rules of equity; and as to that, I would use the words of *Lord Coke (a)*, "Whosoever is seised of lands, has not only the estate of the land in him, but a right to take the profits, which is in nature of a use." So that if the lands descended of the part of the mother, the use shall go to the heir of the part of the mother (*b*), which could not be if it were not the old use (or estate) but only a thing newly created. And the like law is of the custom of borough *English*, gavelkind, &c. This is called a *resulting use*. And the law is the same, if after particular uses there were an express limitation to the feoffor and his heirs (*c*). Indeed some Books do mention this last as a new use; but it has been divers times resolved and settled to be the old use, as in the case of *Godbolt v. Freeston (d)*, and the case of *Abbot v. Barton (e)*. See Salk. 679.

Secondly, As to trusts.

A man in consideration of equity has an estate in land as a trust; this is as a use in consideration of law, and follows the person of *cestui que trust*, being a beneficial interest and profit. And so much of the trust as in a conveyance is undisposed of, the executor (*Q.*) has in him as his antient trust. This is called a *resulting trust*. And if the disposition be by will, the like resulting trust will descend to the heir as part of the antient trust not devised from him. So a conveyance or devise to trustees to pay debts, passes the whole estate in law, and part only of the trust; that is, trusts for the particular sums in nature of chattel interests, after which the residue of the trust results to him or his heir as undisposed; and such residue is the fee of the antient trust descendible; as in the case of *Culpeper v. Austin (f)*. And in *Trinity Term*,

(a) Co. Lit. 23. a.

(b) *Hurst v. Winchelsea*, 2. Burr. 380. *Pearson v. Shore*, 1. Atk. 480.

(c) Co. Lit. 22. b.

(d) 3. Lev. 406.

(e) In the common pleas, *Trinity*

Term 7. Ann. Salk. 590. 11. Mod. 181.

Comy. Rep. 160.

(f) *Michaelmas Term 28. Gar.* 2.

2. Chan. Cases, 115. 121. 223. S. C.

1. Eq. Abr. 272.

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in the thirty-fourth year of *Charles the Second*, it was laid down as a rule, that when lands are appointed to be sold, or are conveyed in trust to pay * debts, the heir is entitled to have the lands after the debts paid, by an implied and resulting trust. In *Ventris (a)* it is said, "if lands be devised for the payment of debts and legacies, and the residue of the personal estate be given to the executor (after debts and legacies paid), the personal estate shall notwithstanding, so far as it will go, be applied to the payment of the debts and legacies, and the land no further charged than is necessary to make up the residue." In the case of *Collet v. Collet (b)*, if a man makes a lease, or devises an estate for years (he being seised of an estate of inheritance) for payment of debts, if the profits of the land surmount the debts, all that remains shall go to the heir, though not so expressed; and albeit it be in the case of an executor. Also the case of *Cook v. Gwavas (c)* was thus: *J. Cook*, 28 *Julii* 1671, after several particular legacies, devised all his goods and chattels to *R. Cook, Esq. Eliz. Cobb*, and *William Gwavas*, to their own disposition, and makes them executors; and by indenture of the same date demised several manors and lands in *Norfolk* to the said *Cook* and *Gwavas* for five hundred years, upon trust for himself for life, and after his death upon trust out of the rents and profits to pay his debts, legacies, and funeral expences; and four years after to attend the inheritance. The plaintiff, as grandson and heir to *J. Cook*, exhibited his bill to have an account of the personal estate, and of the rents and profits of the real estate, and that the personal estate might be applied to pay debts and legacies, in ease of the real. The defendants, the executors, insisted, that they were entitled to the personal estate, as a legacy, and the two trustees claimed the profits of the lands for four years, after the debts and legacies paid, as an implied gift, the term being appointed to attend the inheritance after four years. But it was decreed, that the personal estate be applied in exoneration of the real estate; and that the four years be in trust for the complainant, and such other persons as shall have the freehold and inheritance; and to attend the said freehold and inheritance. In the case of *Sir John Packington (d)*, *Sir Herbert Perrot*, by will dated 21 *June* 1682, made his wife (who afterwards married * *Sir Cyrill Wyche*) executrix, charging her to see his will performed, and thereby gives her a rent-charge of two hundred and five pounds, with this special trust, that she may be supplied with money for the payment of all his debts and legacies; "to which end, I do hereby give to my said executrix a lease for thirteen years, to begin within six months after my decease, of all the said rent-charge of two hundred and fifty pounds a-year." And this was decreed

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(a) Easter Term 32. *Car. 2.* Anonymous, 2. *Vent.* 349.

(b) Trinity Term 34. *Car. 2.* 2. *Vent.* 355.

(c) In the exchequer, 25 *January* in 33. *Car. 2.* 2. *Vern.* 645.

(d) *Wyche v. Packington* and his Wife, in the exchequer, 22 *June* 1708, and 30 *May* 1709. 2. *Eq. Abr.* 507. 744. 1. *Brown P. C.* 372.

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to be a trust for the heir after debts and legacies paid; and this decree was affirmed in parliament on the fifteenth of *May 1712 (a)*. These cases were indeed upon *terms for years*, but the ground of them was this, that though all the term was parted with, yet only part of the trust thereof was disposed; and that not only the inheritance, but likewise all the trust undisposed (*i. e.* the whole trust of the inheritance, and the residue of the trust of the term) descended to, and was part of the old trust in the heir. And the reason is the same where it is of *an inheritance*; if only part of the trust be disposed of for payment of debts or legacies, &c. the residue of the trust remains still undisposed. There have been divers cases of that kind, *viz.* *North v. Crompton (b)*: *Catherine Crompton* seised in fee of the lands in question, by her will, dated the twenty-first of *January 1669*, devised to *H. North, Esq.* her executor, all her estate real and personal, to dispose of for payment of all her debts and legacies; and *int. al.* gives two hundred pounds to the defendant, her uncle, and heir at law. And upon the hearing two questions were made: First, Whether this was a devise in fee; and, secondly, Whether *Mr. North* (the defendant claiming by an implied trust after debts, &c. paid) might not aver against that implication? And after long debate it was decreed against the heir at law, *viz.* First, That a fee did pass by the devise; and, secondly, That there was not any implied trust of the surplus for the heir, because there was two hundred pounds given to him, which was to no purpose if the surplus had been intended him: which case plainly admits a resulting trust in the heir, unless the intent of the testatrix appeared to dispose it from him. And in this case we may observe, that the question was singly, whether there were any trust at all created, or intended, as to the surplus; but not the least doubt, that if all had not passed, the residue would have gone to the heir. * And all these cases suppose this ground and rule, that if any part of the trust were undisposed, it was the old trust, descendible to the heir. And the labour of all the contending parties is to shew, that it is, or is not, all disposed.

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But in the present case there is no question, but that the grantees were bare trustees of the surplus. A trust is here on all hands admitted; it is indeed expressly declared, and our question is only concerning the nature of it, *i. e.* Whether descendible, or not?

Now all the before-cited cases admit it is descendible, if there be one; for they no where tell the heir, that the trust, if there be any, is not descendible. But the single answer they rest on is, that there is no trust at all.

The case of *Coote v. Moore*, the twenty-second of *January 1691*, went yet further: *William Earl of Meath* conveyed several manors and lands in *Staffordshire* to the *Countess of Drogheda*, and

(a) 1. Brown P. C. 372.

(b) 1. Chan. Cases, 196. S. C. 1. Eq. Abr. 272.

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Humphries, to the use of himself for life, with power to sell, and pay debts, in a schedule, and what other debts he should owe at his death; and to pay the surplus to his daughters, who were his heirs; and afterwards devised his personal estate to his wife.

He sold part of the estate himself, and contracted for sale of other part thereof, and died; and on the seventeenth of *July* 1655, upon a bill of the purchasers to have their purchase perfected, it was declared, that the personal estate ought to be applied in aid of the real estate for the benefit of the heirs. And afterwards on a bill by *Sir P. Coote*, who married the *Lady Elizabeth*, one of the daughters, and the said lady his wife, and by the *Lady Catharine Brabazon*, the other daughter, on the twenty-seventh of *January* it was decreed, that the particular estate should be applied to exonerate the real estate in favour of the heirs at law; and yet there was no real estate but this surplus, which was looked upon to be a real estate. And this decree was affirmed in the house of peers in 1692. (*Note*, the division of the house was equal.) And I observe from the printed case which I have seen, that that which the appellant relied upon was,

First, The constant intention of the earl, that the countess should have the personal estate.

Secondly, That the trust estate was expressly charged with debts.

But nothing was urged, that it was not an inheritance.

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* And I take it to be the constant received opinion in this court, that this sort of trust is inheritable.

First, Now suppose the trust had been, to raise the several sums out of the profits, and to pay the residue of the profits to him and his heirs; no doubt but this had been part of the antient trust, and inheritable, and would descend to his heir. And the trust to sell, as I before observed, is but a power till executed; and the trust differs nothing from that in the mean time.

Secondly, Suppose a man seised in fee gives power to his executors to sell his lands, &c. and to pay the money or surplus to his heirs; he there has power over the legal estate, as here he has over the trust; but till that power be executed, the old fee descends to the heir; and when it is executed, then arises a trust in the money in lieu of that in the land, which is now sold and turned into money.

As in the case of *Abbot v. Burton*, in the common pleas, before mentioned, *A.* conveys her lands to several particular uses; and after the particular estates ended, to the use of her and her heirs, with power to appoint the same to such persons, and for such estates as she should think fit, till such appointment made; here the use to her and her heirs is, no doubt, the old use; and if not directed by an appointment, shall descend to her heir; and if the land came
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from the part of the mother, shall descend to the heir of the part of the mother.

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Thirdly, I observe some part of the land in the deed belonged formerly to dame *Dorothy Drummond*, who was *J. Roper's* mother's mother : and then if they descended to him from her, and he had made no will or codicil, but the trust, according to the limitation in the deed, had been to the heir ; I would be glad to know what heir would have had it. Would it not have been the same heir who would have taken the lands if they had not been charged ? No doubt such a resulting use, a use limited by him, to him and his heirs, would have gone to the heir on the part of the mother. And surely the trust of the same lands, being so much of the same trust undisposed, must have gone the same way.

Fourthly, I take it, that the trust, if not devised away, would have been assets by descent in the hands of the heir, upon the statute of Frauds and Perjuries.

Fifthly, That when it is so devised, the heir is so far disinherited, and the devisee put in his place.

Sixthly, That a devise of all his personal estate would not pass it, &c.

* This is the nature of it, as it stood in *J. Roper* himself ; and I take it, that upon the devise here it is no way altered. Here is no alteration appointed. * [191]

I think it would have made no difference, if he had given it by way of appointment. But here it is given as part of *J. Roper's* estate, and consequently not being any part of his personal estate, it must be real. By the will it is given by the name of the residue of his real estate, and in the codicil it is called his remainder in the land.

So that the devisees (if the devise be good) have the trust (in the lands).

First, As it was in *J. Roper* : and, secondly, As it would have been in his heir : and therefore,

First, An hereditament. *Secondly*, A descendible trust in the land.

I shall now in the next place consider the consequence, if this case should be construed to be out of the act of parliament.

I think it has been rightly observed by the Counsel for the plaintiffs at the bar, and by all who have spoken to it on the bench, that the design of the makers of this law, was, first, To get the lands of this kingdom out of the hands of papists ; and therefore it lay difficulties upon them in keeping of their lands, in order to induce them to sell them. And, secondly, to prevent them from making any new acquisition.

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I agree likewise, that the reason of the parliament in forming this design probably was, that they looked upon the landed interest to be the strength of *England*; for that such interests and estates in lands give great authority and influence over their particular tenants, and other dependants.

That it might influence elections to parliaments, if papists, &c. have power to make their tenants freeholders, or to accommodate with their lands such as had no freeholds of their own, by some other title.

And I observe, that in many of the Western manors (some of these perhaps are of that sort) the tenants are frequently freeholders, or have other rights of voting (in corporations, &c.).

* [192] In short, therefore, the law-makers seem to have esteemed estates and interests in lands to be weapons, which * papists, when they had them in their hands, made use of against the public and the government.

I observe, likewise, that they have expressly and particularly provided against terms made to papists; so that by the express words of the act, a term for two years, nay, for aught I can see, a term for one year, or for any certain time, is prevented from being made to papists.

It seems, they thought an interest of so short a continuance (though not of so great mischief or danger as an inheritance) was yet of some mischief, and so much as to deserve a remedy.

And I observe, that the trust of a term is as much within the act as a legal interest in the term; and that the estate in the hands of the trustees of a papist is of the same consideration, as while it is in his own hands.

Let us now consider a trust of this sort as is here devised, and see what difference there will be between this and the most direct trust in land, or any the most open and notorious term or estate in land. And to me it seems plain, that there will be the same influence over tenants and others, as in the case of a direct ownership.

We are now upon the nature of a trust in general, and not upon the particular circumstances of this case; so that a greater or lesser estate, a greater or lesser charge, a greater or lesser surplus, will make no difference in this point, whether within the act, or not.

Suppose an estate of one thousand pounds a-year is conveyed to trustees, on trust to sell and pay off three thousand pounds, and a papist has a right to the surplus. The management of such sale falls naturally into the hands of himself. And the insolvency of tenants, or smallness of the rents, is only his loss. And the sinking of the debts, and increasing the surplus, is to his only benefit; therefore the putting in, or out of tenants, agreeing upon

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upon the terms and rents, and forbearing, arresting, or distraining the tenants, &c. will of course be according to his pleasure. Also,

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The trustees are his friends, and therefore named trustees for him: and they willingly and most safely leave it to his management; nor can they safely interpose or act otherwise (than he desires) without hazard and trouble. But,

Suppose the management were in the trustees, yet they are the trustees of a papist, and for his benefit, which is equally within the act.

* FIRST, Well, but say they, the sale will put an end to this, so that it can be of no long continuance. * [193]

ANSWER. Any term, as I have said, is within the act, as for a single year, perhaps for half-a-year, certainly for two years. And this in the nature of it must exceed that time. For it must wait some time, either to meet with the best chapmen; or to get the best price.

And this is to be for every parcel or part.

So that here is no certainty, nor even probability of the ending of this trust in many years.

SECONDLY, It is said, he is only a tenant at will to the trustees, and they may sell without him.

ANSWER. He is indeed but tenant at will to them; but they have no will but his.

Which way then can a sale be expected without his consent? For,

First, The trustees are his friends, and they (or he) may either disparage the title, or object to the price, or pretend better bidders; or may say, it is unreasonable, or that they will have a better price, &c.

Secondly, As to the executors and legatees, if they press the sale, it is but giving them ample security; they may be made easy with interest, &c. And if there be no other way, it is but to get a friend to advance the money, and all will be easy.

Thirdly, But you will say, the chancery will set all right, i. e. order a sale of the land, and turn it into money. But, how shall it come there when all the parties are made easy, viz. the executors and legatees are secured or satisfied; and the heir of him that made the conveyance will declare, *first*, That he has no interest. *Secondly*, That the conveyance in trust is good; and, *thirdly*, That the trust is not within the act. And in the end must only pay costs, if decreed against him. And,

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Fourthly, As to the next protestant of kin, &c. should he come to pray a sale of part, and to have the profits of the residue, &c. in that case no court may decree the whole to be sold. So he will fare no better.

* [194] First, But we will suppose it depending in chancery (which may be a long time first, and longer before it come before a Master, and longer still before a decree); yet fair bidders may be wearied, &c. by bidders of their own, and (if these will be sturdy) out-bid at last: and (where nobody's interest is to * follow it) easily fly off; or if they do not, yet the papists paying their own money, receive it again themselves, and take a conveyance in the name of their own trustees: and if this be undiscovered, all is well; or if it be discovered, the conveyance, it is true, is void by the act; but then it reverts again in the first owner or trustees; and the consequence is, that

They are to begin the same round again; nor can I see any end this way, where it is nobody's business, interest or inclination to sue; so that the management of the cause may continue for ages. To which no end is likely to be put.

Secondly, But suppose the three thousand pounds debts and legacies paid by perception of the profits before there can be a sale; or suppose he that has the surplus buys them off (as he may well do, if they are not within the act): and if by either of the said ways he becomes the single owner of the said trust: what is the nature of his interest now?

He has now the entire trust of the land, the rents are merely his, &c. Has he yet no interest or profit out of the land? Who shall have the management or power over the tenants, If not himself? And the estate of the trustees is now not in the least for their own advantage, but for the benefit of papists.

Thirdly, This will open a way, not only for a papist to take by devise, but to buy or purchase this sort of ownership of others; for what is not within the act may as well be bought as given. Which sort of exposition will, I apprehend, overturn the act, and will have no other effect, but that some very learned and ingenious gentlemen, who attend here upon this occasion, must, or will for the future, dress up their trusts in a new form.

I own, with me, it is a difficulty to say, that such a trust as this is neither tenement, hereditament, estate, term, nor any other interest or profit whatsoever out of land; and I know not whether, to shut this out of the act, I must not go farther and say, that this estate in fee in the trustees is not any land, tenement, hereditament, or any interest or profit whatsoever. For, if it be any of these, it is plainly in trust for the benefit of persons professing the popish religion, and therefore within the clause and provision of this act.

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To prove this not to be within the act, great variety of arguments have been used. And they say, that the arguments * on the other side prove too much, and tend to great hardships, viz.

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FIRST, That this would disable a papist to make provision for his younger children, if such a trust to make or raise their portions were void.

SECONDLY, That it would avoid a provision for popish executors, &c. and they would therefore distinguish upon the act, and say,

THIRDLY, That the act only intends the continuing of estates in papists, and that here all is to be sold, and by consequence there is no continuing interest in the land.

FOURTHLY, That the act only intends real estates, but that this is money, and merely personal; and as an instance say, a mortgage in fee till foreclosed, the money is in equity personal estate, and shall go to the executors.

FIFTHLY, That estate, term, interest, and profit out of land, mean only perception of profits, and not money to be raised by sale of the land.

And they argued further and said,

SIXTHLY, That a man may sell his land, and give the money to a papist; and therefore he may appoint another to sell it, and to give the money, &c. *Qui facit per alium, facit per se.*

SEVENTHLY, That this answers the intent of the act, to turn popish lands into money.

Before I answer these particulars, I would observe in general :

First, That the arguments used of the hardships to papists are of little force against an act of parliament which is professedly intended to bring hardships upon them.

Secondly, That the distinctions which have been offered do not arise from any words in the act, but from some guesses at what may be thought too hard or unfit, which I think cannot controul the express words; for that would indeed be repealing the act instead of construing it.

Thirdly, That the words in this act are contrived on purpose to exclude all distinction, and seem very strong for that purpose, viz. "all estates, terms, or any other interest or profit whatsoever out of land." So that, let it be long or short, permanent or transitory, descendible or testamentary, of what nature or kind soever, or whatever interest or profit it be, if it come out of land, it seems comprised within the express words of this act.

Fourthly, That if this be a descendible interest, as I have endeavoured to shew, all those arguments fall; though I shall endeavour * to shew them insufficient, were it no descendible interest.

* [196]

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RADCLIFFE.

Fifthly, That in no case is any distinction to be admitted in expounding an act of parliament, which opens a way to destroy the act; as I think this would.

So that should I not satisfactorily remove all the difficulties objected, yet they would not be of weight to alter the words and natural construction of the act.

But to the foregoing objections I give these particular answers, viz.

FIRST, The act does not disable a papist from making any provision for his younger children which they are enabled to take; but those which they cannot take, he cannot make for them; as a rent-charge, or a lease of lands, and as I conceive, a trust of lands.

But what is the consequence of this, that they must not be provided for? No, but must be provided for in a proper method, *i. e.* let him give them money; if he has it not, why does he pretend to keep his land when he wants money for the occasions of his family?

This is a proper method to attain one end of the act, *i. e.* to work papists out of their lands; and putting a necessity upon them to sell, is agreeable to the end and design of the act. If he sell the land or interest therein himself, it is certainly done; but if he raise a trust, it will perhaps never be done, or paid off by the popish heir, &c.

So that this is so far from being an objection, that it is an argument that the act should extend to it.

SECONDLY, As to popish executors, &c.

ANSWER. First, They cannot take lease or grant, and consequently not mortgage. This is within the express words of the act; for it is an interest in land; and on non-payment the estate is absolute in law; and his interest is good in equity to intitle him to receive and enjoy the profits till redemption or satisfaction; and on a foreclosure he has the absolute estate both in law and equity.

Secondly, That the hardship is to persons the law intended a hardship to.

Thirdly, That it is not so hard as to avoid any purchase. For it is what was not contracted for, or relied upon.

* [197] * THIRDLY, It is said, the act only extends to continuing estates, &c.

ANSWER. First, No such distinction is in the act, which says all estates and interests whatsoever. Secondly, This may necessitate sales to provide for children, &c. Thirdly, It is a continuing interest. It is true, the sale, when it happens, may determine it, but that alters not the nature of it in the mean time: And how long ere that may be, God knows. It may continue unfold for ever (and perhaps so intended).

FOURTHLY,

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FOURTHLY, It is objected, that the act only intends real estates, and that this is personal, &c.

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ANSWER. First, No such distinction in the act, nor any words that countenance it; but *à contra*, all terms are expressly within it, which are personal, and go to executors. Secondly, In a mortgage in fee descended to the heir, and unenclosed, the heir is a trustee for two persons, *viz.* First, For the executor as to the money, which is a particular trust carved out of the whole trust of the fee, like a term for years out of an inheritance; and, *secondly*, For the mortgagor as to the rest of the trust, who therefore has the inheritance of the trust. But though in that case the trust for the executor is not an inheritable trust, yet it is really a (continuing) trust in that land for the mortgagor, though of another nature; as he that has a term for years has as really an interest in the land, as he that has the reversion, though of another kind; and though the one be descendible and the other testamentary, it amounts but to this: it will be money after the sale; and what now affects the land, will by the sale affect the money.

So if a man by will gives power to his executors to sell land and pay the money to his heir, till the sale the heir has a fee therein; though when the executors have executed their power, it will be turned into money.

So in *Abbot and Barton's Case* before cited, there was a power to appoint any estates, even the fee, to other persons; but yet till that was done, and the use limited to the party and her heirs, it was the old use descendible to the heirs on the part of the mother.

But, secondly, All rents and profits of lands, when received, will be money or goods, and yet the right to them before-hand is within the act, and is an interest in the land.

THE FIFTH OBJECTION, That the words estates, terms, interests, &c. mean only perception of the profits, &c.

ANSWER. First, Here is a right to have an account and benefit of rents and profits till sale; and the sale only goes in defeasance * of that right. Now, how far off this sale may be I know * [195] not; and here is a direct power over the tenants in the mean time.

Secondly, What essential difference is there between rent and money on sale as to the present point? A rent is the price for which the profits of the land are sold for one year, and a fore-hand rent is properly a taking up the profits of land by anticipation; and on a sale all the profits of all future years are sold, and the party receives the price, which is receiving the profits by anticipation; and no distinction is between fore-hand-rent and after-rent; they are both the profits of the land: profits taken yearly come in all in a lump on a sale; and the right to the one or the other is a right to the profits out of the land.

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And therefore, where a trust has been to raise money out of the rents and profits of lands; and the rents are so small, that to raise it by perception of them would not answer the purpose of the trust; the courts of equity have with great justice decreed a sale, because that is still a raising out of the profits, though taken sooner by anticipation.

THE SIXTH OBJECTION, That what a man may do himself he may do by another, &c.

ANSWER. This rule is right, provided no law hinders; but here the act of parliament hinders; he may receive the rents of his estate twenty years together, and pay them over to a papist; but can he therefore make a lease to another for twenty years, on trust to receive the rents and pay them over to a papist? The difference is plain: In the one case he creates a trust for a papist, and gives him a right to demand the profits of the land; in the other case, the papist receives only the money from him, but never had any demand out of the land.

THE SEVENTH OBJECTION, That this will answer the end of the act, *i. e.* turn papists estates into money.

ANSWER. No. First, This will defer and prevent doing it. It will deliver him from the necessity of doing it; otherwise he must have done it himself, and then it had been over; but by this way the doing it is delayed, and perhaps it will never be done.

Secondly, This brings the interest of unfold lands to the papist, and creates in him a new interest to the land, and a power over the now tenants.

* [199] Thirdly, This goes to sell them, not while they are in popish hands, but when they are descended to a protestant heir. * It is, in effect, a disinheriting a protestant heir, that a papist may have the benefit; which surely was never the intent of the act.

Fourthly, This would be the same as if the trust had been created by a protestant; for if this be not an interest within the act, a papist may purchase it from a protestant, as well as have it given him by a papist. Nor will it be material from whom the estate comes.

THE EIGHTH OBJECTION. But it may be further said, that all my objections arise from the non-performance of the trust, which is not to be supposed; and that a court of equity ought rather to judge of it as if it were performed.

ANSWER. My objections arise, first, from the express words of the act; and, secondly, from the manifest inconvenience if they are departed from.

And as to the supposing a performance, observe:

First,

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First, There must necessarily be supposed a time when it was unperformed, or there is no room for a performance; and at that time a papist had a demand out of, and interest in, the land.

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Secondly, I cannot suppose a trust to be performed which nobody has any necessity, interest, or inclination, to perform.

Thirdly, The trust is to pay out of the profits. Paying out of the yearly rents is no performance in effect. And a sale is the only way to perform it. But that is not done.

THE NINTH OBJECTION. Well, but a cure may perhaps be proposed for the inconveniencies I have objected; as, that if there appears any fraud, a court of equity will set that right, or they may give another construction in such case.

ANSWER. We are not here upon a law made to prevent any act in itself fraudulent or injurious; and if so, yet the evading of this would but occasion the committing of the same fraud another way, and therefore to be met with in the first instance.

Nor are we upon a law which prohibits something under the penalty of a forfeiture to a third person; though in that case perhaps a fraud to deprive such person of a title given him by such an act would be met with.

But this act is a bare disability; and if a man be disabled to purchase one sort of estate or interest, it is no fraud to purchase another sort of interest which he is not disabled to purchase; nor to take care, before he pays his money, * that the seller has an interest of such a nature as he can purchase. [200]

Besides, here he has no stranger to deal with, but simply the person he buys from, who being a party to all that is done, and not surprized or drawn in, but honestly and fully paid, can never complain of fraud.

Nor do I apprehend, that the greater or lesser proportion of the surplus can be material, if the act extend not to an interest of that kind.

Nor can the management of the estate afterwards weigh anything; for this act creates only a disability, but makes no forfeiture; it prevents a vesting, but divests nothing vested; and if the trust is admitted to be theirs, it is too late to dispute with them about the management of what is their own.

SECOND ARGUMENT.

I AM, it seems, in this case, so unfortunate as to differ from some of my brethren; they holding,

FIRST, That this case being on a will is not with the act; and,

SECONDLY, That if it were, yet this method will not determine it.

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This only opens a way to a further labour to consider,
Whether a gift by will be within the act, or not?

Now consider, first, By the first expression in this clause,
“every person being a papist, or professing the popish religion,
“is disabled to purchase.” And,

Secondly, By the second, “all estates made to any such person
“are declared void.” And here being in neither expression any re-
ference to any one manner of conveyance, there seems no room for
a distinction, whether it be by fine, or by deed, or by will, &c.
But here is a general incapacity of all manner of conveyances; and
all estates, howsoever or by whomsoever made, are declared void,
if made to such persons after such a time.

This seems to me to be the clear sense of the words.

But the objection consists of two parts; if either of which fail,
it falls to the ground.

[201] * FIRST, It is said, that the first expression does not import any
disability to purchase in a proper or legal sense, but only a disability
* to purchase for a valuable consideration, which is said to be the
vulgar and common sense of the word.

SECONDLY, That those words which make estates void, if made
to such persons, mean not such persons as profess the popish religion
(generally), but only such purchasing papists.

And consequently that the plaintiffs, not having paid any valua-
ble consideration, but this trust being given to them freely by a
will, this case is not within the act of parliament.

I hold both these propositions to be wrong; though if either be
so, the conclusion will fall.

First, A purchaser is a law term, and imports any estate which
is not cast upon a man by act of law (as descent or escheat); but
which he takes or accepts by conveyance for money or other con-
sideration, *vel aliâ quavis fortunâ* (says Sir H. Spelman), or freely
of gift (says my Lord Coke expressly), *Litt. fol. 12. 1. Inst.*
18. a. b. And thus it has been constantly used by all lawyers for
some hundreds of years without interruption.

Not to multiply particulars, let me instance in the manner of
expression of that known rule which is in every lawyer's mouth, as
mentioned by that very accurate Judge Lord Hobart, in *Counten*
and Clark's Case, *Hob. 30.*

“This is a positive rule, that a man cannot raise a fee-simple
“to his own right heirs, as a purchaser, neither by conveyance of
“land, nor by use, nor by devise.”

Mr. Attorney would seem to imagine a difference between the
words “to purchase,” and “to take by purchase;” but it is clear
they

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they are all one, and the verb "to purchase" is constantly used in the same sense as "to take by purchase;" and in 1. *Inst.* 2. a. b. it is used so near a dozen times. And,

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The general licences to abbies after the statute of *Merton* are generally only leave to purchase (so are charters to corporations); but no one ever doubted, but that thereby they might take what was given them, as well as what they should buy and pay for.

And here all the conjugates are used in the same sense as the word *purchasor*, which is *nomen verbale*, and being formed from that verb, *to purchase*, it is naturally and properly to be used in that sense.

I will mention but one instance where that word is used in a statute in the same sense (though in another form of expression) on the rule before cited out of *Hobart*. It is in *Pybus and Mitford's Case*, 1. *Vent.* 372. where *WILD, Justice*, says, * I agree, a man cannot, either by conveyance at common law, limitation of uses, or by devise, make his right heir a purchasor.

[202]

Surely laws are to be understood according to the language of the law, and a law term in an act of parliament is to be taken in its legal sense.

The statute 15. *Rich.* 2. c. 5. takes notice, that mayors and commonalty of cities and boroughs, and other towns which have a perpetual commonalty, be as perpetual as people of religion; and therefore first expressly extends the statute *de Religiosis* to them in these terms: "from henceforth they shall not purchase to them and their *com.* upon pain contained in the said statute *de Religiosis*."

And it was never doubted but that it would extend to what should be given to them, as well as to what they should buy.

I agree, that purchasors for valuable consideration have been distinguished from others in several acts of parliament, by provisions made particularly for them, that they should not lose their money; or by exceptions to prevent their being involved in general provisions against fraud; but were never distinguished to their loss or prejudice, nor ever singled out to lose their estates because they had paid for them. Nor do those acts of parliament which are in their favour speak of them as of purchasors generally, but only as of one species of purchasors, *i. e.* purchasors for valuable consideration in express terms; as,

The statute 27. *Eliz.* c. 4. against fraudulent and covinous conveyances, *sect.* 1. recites the loss the subject may have after purchases made, &c. of lands, &c. for money and other good considerations; *sect.* 2. makes fraudulent conveyances void against persons who shall purchase for valuable considerations; *sect.* 8. makes statutes not entered in due time void against persons who shall purchase for money or good consideration,

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The statute 21. Jac. I. c. 19. of Bankrupts, *sect.* 14. provides, that no purchaser for good and valuable consideration shall be impeached by that act, unless the commission be sued out within five years. And the statute of Frauds and Perjuries, *sect.* 15. is, that judgments, as against purchasers *bona fide* for valuable considerations, of lands to be charged thereby, shall in judgment of law be judgments only from the signing: and, *sect.* 18. no recognizance * shall bind any land, &c. in behalf of any purchaser *bona fide*, and for valuable consideration, but from the time of the enrolment.

* [203]

I agree, if a gentleman at the bar were arguing on the statute 27. Eliz. against a fraudulent conveyance, and should say, that his client was a purchaser, I should understand him to mean a purchaser for a valuable consideration; not because the words *ex vi termini* import it, but because the occasion of his using it shews that to be his meaning, or he talks nothing to the purpose.

But the case is different when we have under consideration the proper sense of the words of an act of parliament, where no declared meaning in any other part of the act determines the intent, but we are to judge upon the enacting part, what they have done, and only thence are to learn their intent, and what they designed to do; for there of necessity the act must be understood always to speak properly, and in the language of the law.

But should I admit, that an act of parliament providing against frauds and artifices to defraud purchasers is to be confined only to purchasers upon valuable considerations, though not so expressed; for that purchasers by free gift can hardly be said to be defrauded in the language of the law; for if the gift be defeated they are but where they were, and so the subject-matter may supply the distinction omitted in the words:

Yet here is no ground or reason for the distinction; it is all one, as to the end and intent of this act, whether the lands were paid for, or not.

If the law-makers looked upon lands in papists hands as the support of popery, and to stop the growth thereof, and the mischief the owners might do the public, thought it reasonable to make provisions against their further acquisitions, Is it at all material whether those acquisitions were paid for, or not? One hundred pounds *per annum* acquired by a papist by a voluntary gift or will, will be as prejudicial to the public, and as much against this act, as where he has paid two thousand pounds for it.

Nay, I take it it will be more so; for then he has the land, and keeps his money too, &c.; and if he has gotten a new sword, &c. it will do as much execution when given him as if he paid for it.

* [204]

* The mischiefs intended to be remedied are the rule whereby acts of parliament are to be expounded, and the words are stretched, if

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if there be occasion to reach them all. But it is very hard to reject the proper, natural, and legal sense of the words in any case, much more when it will so plainly let in an equal mischief.

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The first statute of Mortmain speaks only of religious persons. Now among all the reasons or expositions of those laws it was never pretended, that paying no consideration excused them.

The statute 15. *Rich. 2. (supra)*, speaking of lay communities, forbids only purchasers generally; and yet it was plain the law-makers looked on them as equivalent. The conveyance in mortmain was the thing in view, whether a price were paid or not, and what was the motive was not material.

To give a much stronger instance: The statute of *Magna Charta* c. 32. (*Nullus liber homo debet de cætero amplius, &c.*), expresses both give and sell: but not expressly preventing the mischief to the lords, it was extended by construction.

Also the statute 18. *Edw. 1. Quia Emptores*, enacts, that from thenceforth it shall be lawful for every freeman to sell, &c. Now here was fair room for a distinction, that this statute sets the freeholders free from *Magna Charta* where they sell, but not where they give; because the statute only gives liberty to sell, and *Magna Charta* expressly forbids giving as well as selling; but the act being a provision for the lord, and the price being between the parties only, and the mischief of giving being the same as to him, it has been extended thereto.

And *Litt. sect. 40.* speaking of this act, says, that it was thereby ordained, that no man should alien or (give) grant lands or tenements in fee-simple, to hold of himself: and that the word *sale* extends to gifts (2.).

So here the care is for the public, and to prevent papists from getting new acquisitions. What is paid is only between the grantor and grantee, but does not concern the public at all. And therefore, &c. no reason to form a distinction here.

But we are not contending to enlarge the sense of the word (*purchase*), but only to understand it in its true, genuine, proper, and legal sense. And,

* Thirdly, There is still less room for this distinction, * [205] because the subject-matter of this clause is properly an incapacity or disability.

Acts of parliament are always expounded according to the rules and reason of the common law; and when a provision is made by act of parliament, the law endeavours to range it with some provisions of its own of like nature.

The statute *De Donis* enacts, that tenant in tail *non habeat potest. alienandi terram datam*, so as to prevent its coming to his issue; and that a fine thereof *fit in ipso jure nullus*. Now the end and

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and effect of this statute is a disability to alien to the prejudice of others ; and therefore the law now ranks him with bishops and other ecclesiastical persons, and with husbands, who by the common law were disabled to alien to the prejudice of their successors and wives.

And therefore, though the act be, that tenant in tail shall not have power to alien, and that his fine shall be void ; yet it was construed, that his fine was not void, but made a discontinuance, and put the issue to his formedon ; and that his other alienations either put the issue to his action, or allowed his entry, just as the law stood before in relation to bishops.

Now here by this clause an incapacity or disability is brought upon a papist. Then inquire, Has the law any species of incapacity with which to rank this ? Yes ; for capacity and incapacity to purchase is a settled notion therein, and therefore papists are to be construed to be in the same condition with those who were under an incapacity to purchase at common law. And whatever distinction might be between one purchaser and another in respect of the consideration and other circumstances ; there never yet was any between one incapacity to purchase and another ; and a man under such incapacity was no more capable of lands given him than of lands bought ; and if this act be construed according to the reason of the common law, a papist is in the same case.

And upon the whole, I think that the word *purchase* here does by no means make a valuable consideration necessary.

But if there could any doubt remain ; yet,

* [206] SECONDLY, The later words leave no room for any distinction upon the point of the consideration ; they are plainly * more general, and I apprehend more extensive than the former ; and therefore if there were any doubt upon the word *purchase*, *i. e.* whether the larger or narrower sense of the word should be taken, it must now be in the larger sense ; because the sense of those later words in the act is at least as large as the largest sense of the word *purchase* ; and there can be no other use of them but to supply the defect or narrowness of the former words.

Therefore I shall not contend that it is an independent clause : I content myself to have it admitted to be an explanatory or supplemental clause, as the words therein, " such person or persons," must be explained to be person or persons professing the popish religion, *i. e.* such person or persons as are spoken of before.

This is the natural sense ; but to construe " such person or persons " to be such purchasing papist is harsh, and I think not to be supposed either from the grammar or the context ; for the word *such* refers to a precedent description, and consequently to the circumstances he is before described by ; and not to make words mentioned in his punishment to be a necessary part of his description.

Suppose

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Suppose the first disability had been a disability to sue or bring an action, and the clause had run thus, that "all and every papist, or person professing the popish religion, shall be disabled and made incapable to sue or bring an action, and that estates made to such person or persons should be void;" would these last words be expounded only of such persons as should sue or bring actions? No surely; the different punishment inflicted can make no difference in the description of the person.

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I cannot better illustrate this than by the common method used in passing bills in parliament, *i. e.* to bring them in with blanks for times and penalties. And so this clause in the bill would run, when first brought in, thus:

"And that from and after every papist, or person
"professing the popish religion, shall be disabled, and is hereby
"made incapable, &c. And that all estates, terms, interests, or
"profits whatsoever out of lands, from and after , to be
"made, suffered, or done, to or for the use, &c. of any such per-
"son or persons, or upon any trust or confidence, to or for the
"benefit or behalf of any such person or persons, shall, &c."

As it stands here, the words "such person or persons" are plainly such as are described in the beginning of the clause, and are used to save the repetition of that which is in the foregoing * description. Is it possible now to think, that the filling up of the blanks can alter the description of the persons; and that one sort of persons will be meant if one punishment be inserted, and another sort if another? or,

* [207]

That if the first blank be filled up with a disability to sue, that the last clause only affects estates granted to plaintiffs; or if with a disability to bear an office, only estates granted to officers; or if with a disability to be an executor, only estates granted to executors?

No; the description was full and complete at the first; the same persons are the subjects of both parts of the clause; and whether the blank be filled up with one sort of punishment, and the second with another, or whether the second be only an inforcement of the first, it will be all one.

Besides, if you would refer it to punishment, it should be such papist as is disabled to purchase, and not such papist purchasing, for there is no purchasing papist spoken of.

But the former exposition operates not only upon purchasing papists, but upon all: all are immediately *ipso facto* disabled, and the act has its effect upon those who are thereby deterred and restrained from purchasing as fully and as properly as upon those who shall attempt to purchase and lose; and more agreeable to the intent of the act, which seems to aim at prevention rather than forfeiture. It seems then very strange, that the later words should not extend to all papists too.

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In the sense wherein I take them, the later words are very useful and proper; they enlarge the former words, if they are too short, or, by using words not so capable of distinction, remove the ambiguity.

And the present question shews it was very fit to put them in for that purpose. But in any other sense they are vain, and increase the doubt instead of removing it.

And to look more narrowly, the word *relief* in the later expression seems calculated for a gift, as an estate given or provided for children, relations, or any in want, is properly said to be for their relief; but an estate in land which a man buys can never be said to be for his relief; he has only altered the nature of his estate, and is not a jot the richer. 2.

* [208] * OBJECTION, That devises are not within this clause; for that

First, They are mentioned in the former clause, and dropped in this; and,

Secondly, If they be, this clause clashes with the former, and makes an absolute disability in the same case where that makes only a qualified one.

ANSWER. Devises are not dropped in this second clause. It is true, they are not named therein, nor indeed could they be as that clause is penned; but it is plain they are meant and implied in it.

Had the second clause made all fines, feoffments, grants, releases, &c. to papists void, and had omitted devises, it might have been justly said, that devises were dropped, or excluded, in it.

But here the general words of this second clause being relative to the former, it is plain devises are included in those relative words, devises being expressly mentioned in the antecedent clause, to which this subsequent does relate.

CASES

C A S E S
I N
The COURT of CHANCERY,
FROM
MICHAELMAS TERM
I N
THE TENTH YEAR OF GEORGE THE SECOND,
TO
MICHAELMAS TERM
I N
THE TWENTIETH YEAR OF GEORGE THE SECOND.

IN
THE COURT OF CHANCERY

MICHAEL T. TAYLOR
THE TRUSTEES OF THE

MICHAEL T. TAYLOR
THE TRUSTEES OF THE

C A S E S

I N

The COURT of CHANCERY,

F R O M

MICHAELMAS TERM

I N

THE TENTH YEAR OF GEORGE THE SECOND,

T O

MICHAELMAS TERM

I N

THE TWENTIETH YEAR OF GEORGE THE SECOND.

*Lord Hardwicke, Chancellor.**Evit against Williams and Others.**Case 77.**At the Rolls, November 2^d, 1739.*

ONE *Farr*, possessed of a long term of a personal estate of five thousand pounds, by will directed that after payment of several legacies, &c. the rest and residue of his personal estate should be set out at interest by the defendants *Mary* his wife and his friends *John Ireland* and *Thomas Hassall*, "for the use and benefit of the said *Mary*, and of such child and children which she should be *enceinte* with at the time of his decease; and in case she should die *without issue by him, upon her death* he gave the same to *Anne* and *Phillippa Evit*, the plaintiffs; and in case they should die before his said wife, then he gave the same to his sister."

If personality be devised to a wife as she shall be enceinte with at her husband's death, and in case she die without issue by him, upon her death a devise over; this is a good executory devise.

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Mary

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against
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Mary his wife had not any child, nor was *enceinte* with any at the testator's death, but afterwards married *Williams*, one of the defendants. *Anne Evit* died, and left her real and personal estate to the plaintiff *Phillippa Evit*, her sister, and made her executrix.

The bill was brought to have an account of what estate would remain after payment of the testator *Farr*'s debts, &c. and to have it set out at interest by the trustees in the will, and to compel security from *Williams* and *Mary* his wife, for the plaintiff to enjoy the residue, as by the limitation over to her.

THE QUESTION was, Whether the devise over to *Anne* and *Phillippa Evit* was good, or not?

Eq. Caf. Abr.
191. 4).
1. Lev. 290.
2. Chan. Rep. 4

The great objection by the defendants was *Mary*'s dying without issue; that those words extended so far as to endanger a perpetuity; and therefore the remainder to *Anne* and *Phillippa Evit* was void; for the wife of the testator might have had issue in the understanding of the law to a hundred or a thousand years to come; for grandchildren, great-grand-children, &c. are "issue;" and that the remainder over being of a chattel cannot depend upon a possibility so remote as the dying without issue, because of an apparent tendency to a perpetuity.

Eq. Caf. Abr.
191.
Fearn, 371.
3. Pr. Wms. 262.
4. Bl. Com. 175.

THE MASTER OF THE ROLLS held, that this was an *executory devise*, and that limitations over of personal things are good, where the contingency is to happen in the compass of a life or lives *in esse*; for then there is no danger of a perpetuity, which was one great mischief apprehended from these kind of limitations; that if the dying without issue in this case was to be understood in a sense so enlarged as the defendants contended for, then he allowed the limitation void; but he held, the "dying without issue" here must be at the time of *Mary*'s death; for the words are, "and if she die without issue by me, upon her death I give the same to *Anne* and *Phillippa Evit*;" so that the contingency is to happen within one life *in esse*, which is *Mary*'s; and that the contingency is already come to pass, for as *Mary* was not big with any child by the testator, the limitation over is good; but had there been a child to take jointly with the mother, the remainder over would have been void, for then there would have been a danger of a perpetuity. You take away the objection; for by taking away the child you take away the danger of a perpetuity; and therefore the remainder good.

And A DECREE was made for the plaintiff.

Case 78.

Garbut against Hilton and Others.

At the Rolls, Michaelmas Term, 13. Geo. 2. November 26, 1739.

On a devise of so much money to a *feme sole*, " provided she " marry with

PHILLIPPA DOWNS, by will, devised to *Jane Garbut*, the plaintiff, a legacy of two hundred pounds, provided she married with the consent of her father and mother, or the survivor of them.

" the consent of her father and mother, or the survivor of them;" the marriage is a condition precedent to the payment of the legacy.—S. C. 1. Atk. 381. S. C. 1. Vezey, 5.

The

The plaintiff *Jane* before any marriage, and living her father and mother, brought her bill against *Hilton* and others, as executors to *Phillippa Downs*, for the two hundred pounds.

CAREW
against
HILTON
AND OTHERS.

THE QUESTION was, Whether or no this was a vested legacy, the plaintiff being not married, and her father and mother living?

IT WAS SAID for the plaintiff, that as there was no devise over of the legacy, and as it was payable out of the personalty, the condition was *in terrorem* only to intimidate the legatee from behaving imprudently in her marriage, and therefore void (a); and considering the legacy without any condition at all, it must be a vested one; that by the civil law such a legacy not to marry without consent is void, though there be a limitation over; for the maxim there is, *Maritagium esse liberum*; that there would be many cases where such a condition not to marry without consent of the father and mother would be extremely hard; as where the father and mother should die before any competent match should offer, or where they should not be in humour to consent, or where one should consent and the other not.

THE MASTER OF THE ROLLS was clear, that this legacy was not vested; that it was payable after marriage, but not till then; that if the plaintiff had married without consent, then would be the time to bring her bill, and dispute whether the condition was *in terrorem* only, and void; that in all the cases cited, except 2. *Vern.* 452. the bill was brought after marriage; that if the condition be *in terrorem*, yet marriage in this case is absolutely necessary before the bringing a bill, unless it was to be under the same circumstances as that in 2. *Vern.* 452. and *Nelson Chan. Rep.* 62. of never intending to marry, and of giving security to refund if the condition should be broken. HIS HONOUR was much directed by a case in *Swynb.* 246. and another in *Godolph.* 381.

And he dismissed the bill (b).

(a) See *Aston v. Aston*, Prec. Chan.

226.

(b) *Atkins v. Hiscocks*, 1. Atk. 500.
S. C. 2. *Vezey*, 5. *Pullen v. Ready*,

2. Atk. 500. *Elton v. Elton*, 1. Will.

159. *Hemmings v. Munckley*, 1. Bro.
C. C. 303.

Sheldon against Sheldon.

Case 79.

Rolls, Michaelmas Term, 13. Geo. 2. November 26, 1739.

A. GAVE a legacy of fifty pounds to B. payable two years after A's death. B. made his will, and gave all his personal estate to C. and made him executor. B. died within the two years. C. brought his bill against the executors of A. for the fifty pounds.

If a legacy be given to B. payable two years after the testator's death, and

B. dies within the two years, yet his executors are intitled to the legacy.

SHELDON
against
SHELDON.

And THE MASTER OF THE ROLLS decreed for the plaintiff, and said, that where a legacy is devised to one generally, to be paid or payable at any age, or two years, or any other time, after the death of the testator, and the legatee dies before that age, or within that time, yet it is such an interest vested in the legatee, that his legatee, executor, or administrator, may sue for and recover it; for it is *debitum in presenti*, though payable *in futuro*, the time being annexed to the payment, and not to the legacy itself: and would have no cases cited.

(a) See Cloberry's Case, 2. Vent 342. Dawson v. Dawson, 1. Brown's C. C. 119. and 2. Fontblanque's Equity, 371. and the cases there cited.
Collins v. Metcalf, 1. Vern. 462. Gordon v. Raynes, 3. Peer. Wms. 138.

Case 80.

Boughton against Boughton.

Lincoln's-Inn-Hall, December 5, 1739.

A father makes a voluntary settlement on his family, without power of revocation inserted, and afterwards makes a contrary disposition by will, this will not affect the former settlement.

S. C. 1. Atk. 625.

Prec. Chan. 182.

2. Vern. 473.

2. Peer. Wms.

359.

Amb. 264.

EDWARD BOUGHTON, father to the five young ladies the plaintiffs, settles his estate on himself for life; remainder to his wife for life for her jointure; remainder to the first and other sons in tail; and in default of issue male, limits a term of five hundred years to trustees to raise two thousand pounds a-piece for all such daughters he should have; remainder to his own right heirs.

Edward had issue only daughters, the plaintiffs, and having in himself a remainder to his own right heirs, makes, 15 February 1733, the following deed, and in these words: "WHEREAS I have heretofore, by several letters, promised a certain gentleman three thousand pounds with my daughter *Hannah*, and my estate at my death, if he will take the name of *Boughton* upon him; BUT WHEREAS he has affronted me, and lest he should take advantage of them after my death, I do hereby charge all my estate with four thousand pounds a-piece for all my children, with a hundred pounds to my sister *Cook*, and five hundred pounds a-piece to her two sons: and I do hereby bind myself, my heirs, &c. in the sum of twenty-five thousand pounds to my children, their executors, &c. if all my estate, at my death, shall not be equally divided among them, except the money given to my sister *Cook* and her two sons."

Edward afterwards, by will, disposes of his estate in a very contrary manner to the last deed.

The bill was brought against the devisees and trustees of the will.

THE QUESTION was, Whether the will could have any effect to revoke the deed? and the case of *Clavering v. Clavering* (a) was cited for the plaintiffs, and the case of *Naldred v. Gilham* (b) for the defendants.

HARDWICKE, Lord Chancellor, said, that as this was a deed formerly executed in the life-time of *Edward Boughton*, and a volun-

(a) 2. Vern. 473. S. C. Prec. Chan. 135. S. C. 1. Brown. P. C. 122.

(b) 1. Peer. Wms. 378.

tary settlement without a power of revocation, it will not be subject to a revocation by the will; for if it was, there would be no difference between a deed with a power of revocation, and one without that. The case of *Naldred v. Gilham* was, where an old woman executed a voluntary settlement of her estate, which she always kept by her, in favour of her nephew; a copy of this was surreptitiously got by the nephew's father; the old woman changed her mind, and made a different disposition by will; and after her death, a bill was brought to set up the copy against the will; and THE MASTER OF THE ROLLS decreed the copy to be good, because the original was lost; but upon an appeal to MACCLESFIELD, Lord Chancellor, the decree was reversed; for as it was only a voluntary settlement, and kept always by the party, it must be presumed she intended to have a power over it; and he refused to shew any kindness to a copy gained so fraudulently, or to a voluntary settlement under such circumstances: that in this case the deed was not destroyed; and that as it was for the provision of children, it was a kind of a consideration; and that it should take place of all other voluntary settlements; and therefore of the will, which was voluntary, but not of debts or other settlements for valuable considerations.

The defendant's Counsel urged, that the two thousand pounds a-piece secured to the daughters by the settlement was to be included, and make up a part of the four thousand pounds; and therefore what was not given to the daughters by the deed was well devised by the will.

Cheefeman against Partdrige.

Lincoln's-Inn-Hall, December 6, 1739.

UPON EXCEPTIONS to a decree by commissioners upon charitable uses—THE CASE was: *Thomas Chiefeman*, by will, after giving several pecuniary legacies, goes on: "ITEM, I give to the charity-school of *Yovell* the sum of fifty pounds; ITEM, I give to the *Latin* school, if any man is possessed of it, and teaches boys, and is truly grounded in the *Latin* tongue, five pounds a-year, for teaching and instructing three poor boys; ITEM, I give to the poor of the parish of *Yovell* fifty pounds a-year, to be paid at *Easter* out of my estate at *Omer* by my executor;" and gives his estate at *Omer* to his wife, the executrix, and her heirs, and made her sole executrix; and his will was, that his wife should enjoy all his other lands not before devised in his will for her life, upon paying his legacies.

The inquisition found, that the testator made his wife executrix, and that she had possessed herself of the real and personal estate; and that *Partdrige* the respondent had been schoolmaster of the *Latin* school for two years, whereby ten pounds became due to him by the will.

Whereupon the commissioners made their decree in these words, "That *Sarah Chiefeman*, the exceptant, do and shall, within one

also charged upon the estate at *Omer*, in whosesoever hands it comes.—S. C.

BOUGHTON
against
BOUGHTON.

Case 81.

A. after giving legacies, goes on: "Item, I give to the charity-school of Y. sol.; item, I give to the Latin school of S. 5l. a-year; item, I give to the poor of Y. sol. a-year, to be paid out of my estate at Omer by my executor," and gives the estate at *Omer* to his executor in fee; this is a perpetual annuity of 5l. to the *Latin* school, and 1. Atk. 436.

CITIZENMAN *against* " month, pay, or cause to be paid, to *Partdrige*, the respondent,
PARTDRIGE. " the sum of ten pounds due to him at *Lady-Day* last; and that
" the owner of the estate at *Omer* do and shall, for ever hereafter,
" pay to the schoolmaster of *Yovell Latin* school the sum of five
" pounds half-yearly."

Two exceptions were taken to this decree.

THE FIRST was, that the messuage called *Omer* was not chargeable by the will to pay five pounds a-year to the *Latin* school of *Yovell*.

THE SECOND EXCEPTION was, that if the same was so charged, it was but for the executrix's life, and not for ever, nor to pay in the manner and proportion the decree directed, half-yearly.

HARDWICKE, *Lord Chancellor*, over-ruled the first, and declared it was charged; that the testator seemed to have two general intentions, the one to give sums in gross, and the other annuities; that it was apparent, from the will beginning with money-legacies, and then ranging the annuities by themselves, that the estate at *Omer* is directly charged with the fifty pounds a-year to be paid the poor, and directed that clause to be carried back to the clause of the five pounds annuity, so as to make but one, and to be both charged on the estate at *Omer*, because they are both bequests of the very same nature; and to warrant his joining the two clauses, he cited 1 *Salk.* 234. that "ITEM" in this case was no more than "*and also*," in that the five pounds was not payable out of the personal estate, as was urged; for there is no provision in the will to raise a perpetual fund out of it to furnish an annuity commensurate to the devise, which is for ever; and that without such provision, a personal estate must be allowed to be of too perishing and transitory a nature to supply an annuity for ever.

That it was not charged on the lands the wife had for life, as was argued, for the precedent reason, that an estate for life cannot supply a perpetual payment of the annuity; and this annuity must be charged on the estate at *Omer*, as it cannot be supplied by any other estate in the will; and that paying legacies out of the wife's estate for life means only sums in gross, and not annuities.

2. Vent. 349.

LORD HARDWICKE, to the second exception, said, as to the continuance of the annuity, that it was the intention of the testator to have it perpetual; for it is not given to the schoolmasters, or any other person, but to the school, and therefore designed it to last as long as the school itself; and that a gift to a parish-church will be a good gift for ever to the parsons of that church; that the gift is for instructing three poor boys, and if the testator had only three particular boys in view he would have named them, and so have limited the duration of the annuity, or how long it should continue; that the testator saying "to be paid by my executrix," does not destroy the perpetuity; for the exceptant is not charged in the will

as executrix in respect of the office, but is only described by that word as owner of the estate at *Omer*, which was devised to her and her heirs (a).

CHESSEMAN
against
PARTDRICE.

Thus far he over-ruled the second exception; but said, the commissioners exceeded their power, and were not warranted to make the annuity payable half-yearly; and ordered the decree to be altered to one yearly payment every *Easter*, as the payment of the fifty pounds a-year to the poor is, and the decree to stand good upon that alteration,

(a) See *Edgel v. Haywood*, 3. Atk. 352. 357.

Graydon against Hickes.

Case 82.

Lincoln's-Inn-Hall, December 6, 1739.

JOHN GRAYDON, by will, devises in these words: "I GIVE A. by will gives to his daughter, *Mary Graydon*, the sum of one thousand pounds, to be paid her at the age of twenty-one years, or day of marriage, which shall first happen, provided she marry with the consent of my executors; but in case she die before the money become payable on the condition aforesaid, then I give the same one thousand pounds equally between my younger sons *Benjamin* and *Gregory Graydon*, the plaintiffs;" and makes three executors.

to his daughter
to be paid
at twenty-one,
or marriage,
provided she
marry with con-
sent of execu-
tors; if any of
the executors
die, condition
void.

All the executors died before the marriage of the said *Mary Graydon*, one of the defendants by the name of *Mary Hickes*; and the defendant's mother, who was surviving executrix, made her will, in the beginning of which she gave the defendant, *Mary Hickes*, all her dressing-plate, gold watch, with several other specific legacies; and in the middle of her will she says, "ITEM, my will is, in case my daughter *Mary* shall marry before she attain the age of twenty-one years, without the consent of my executor first had and obtained under his hand and seal, if he be living, that then she shall not be intitled to any part of the legacies which I have hereby given her, but that her whole share shall be equally divided between my sons *Benjamin* and *Gregory Graydon*;" and in the latter part of the will devises the residue of her personal estate to the said *Benjamin* and *Mary* equally, and makes her eldest son, *John Graydon*, executor.

S. C. 2. Atk. 16.

The son renounced the executorship; and *Mr. Timewell*, one of the defendants, took out administration to *Mary Graydon*, the mother, and administration to *John Graydon*, the father, *de bonis non*. The defendant *Mary*, the daughter, married before twenty-one, without consent of *John Graydon*, the executor named by the mother's will.

The bill was brought for an account, and to have the one thousand pounds legacy given the defendant by her father, and the spe-

GRAYDON
against
HICKES.

cific legacies and share of the *residuum* given by the mother, as devisees over, if the defendant *Mary* married without consent before twenty-one, which she did with the defendant *Hickes*.

LORD HARDWICKE decreed that the one thousand pounds in the father's will was not forfeited, the executors being dead before the marriage of the defendant *Mary* before twenty-one. The condition to marry "with the consent of my executors" (jointly), the executors being all or any of them dead, would become impossible; and the condition is subsequent, being annexed to the time of payment, and not to the legacy itself; and when conditions subsequent become impossible by the act of God, the performance of the condition is excused, and the estate absolute (*a*). *Co. Lit.* 206. To this purpose are the two following cases, not long ago decreed. In the case of *Peyton v. Bury* (*b*), upon an Appeal from the Rolls, JAMES PEYTON gave by will the sum of one thousand pounds to his mother for life, and after her death devised the same to his niece, PROVIDED she married with the consent of two persons named in the will, with a devise of the one thousand pounds over to one of the persons named to give consent, and died; and the niece, the legatee, married without the consent of the survivor; and upon a bill brought by the niece and her husband for the legacy, THE MASTER OF THE ROLLS decreed for them; for it being a personal trust, and to be performed by both persons jointly, and not by one singly, the condition was impossible by death, which is an unavoidable act of Providence, and the legacy absolute. In the case of *Fountain v. Hart* (*c*), a person gave a legacy to *A.*; and in case she married without the consent of his executors, he devised it over; one of the executors died; and though *A.* married without applying to the executor who survived for his consent, the legacy was decreed to *A.* and her husband, because it was now impossible to marry with the consent of both executors, one being dead, and the restriction become impossible to be complied with (*d*).

But if a legacy be given to *A.* with condition, that if she shall marry before twenty one, without the consent of the executor, then to *B.* &c. C. the executor renouncing, yet this consent necessary to save the condition.

The question upon the mother's will was, Whether the specific legacies were forfeited, as also the defendant *Mary's* share of the *residuum*?

BROWN, for the defendant, argued, that such condition was become impossible, and could not be performed according to the

consent of the executor, then to *B.* &c. C. the executor renouncing, yet this consent necessary to save the condition.

(a) See *Harvey v. Aston*, 1. Atk. 375. S. C. Comy. Rep. 726. S. C. Cases T. T. 212.

(b) *Peyton v. Bury*, 3. Peer. Wms. 626.—See also *Jones v. Suffolk*, 1. Bro. C. C. 529.

(c)

(d) See upon the subject of this case, *Porter v. Fry*, 1. Chan. Cases, 138. *Aston v. Aston*, 2. Vern. 452. *Gillet v. Wray*, 1. Peer. Wms. 284. *Semphil*

v. Bayley, Prec. Chan. 562. *Pullen v. Ready*, 1. Willf. 21. *Underwood v. Morris*, 2. Atk. 184. *Daly v. Desbouverie*, 2. Atk. 265. *Elton v. Elton*, 1. Willf. 159. *Rhenish v. Martin*, 3. Atk. 330. *Wheeler v. Bingham*, 3. Atk. 364. S. C. 1. Willf. 135. *Long v. Dennis*, 4. Burr. 2. 52. *Hemmings v. Muncley*, 1. Bro. C. C. 303. *Scott v. Tyler*, 2. Brown. C. C. 431.

letter of the will ; for by the son's renouncing the executorship, there was then no executor to have the consent of, and therefore the legacy unforfeited.

GRAYDON
against
HICKES.

THE CHANCELLOR said, this objection was not well grounded, for the condition is not annexed to the office of executor ; but the said executor is a description of the person only, and land is often given to a man by the name of executor ; that this is a personal power given to him, not as executor, for it is said, " if he shall be "living," and does not require his taking the office of executor upon him ; and as there is a devise over, not only the specific legacies, but also *Mary's* share of the *residuum* is forfeited ; for the condition affects them both, the clause being general, and not limited to either in particular, and as far from one as the other, for it is in the middle ; that though the testatrix could not speak all her words at once, yet the whole will shall be understood to be spoke at the same time, and to be but one entire thing, and the condition to extend to every part of it, as it is not tied to either the specific legacies or *residuum* in particular ; and the *residuum* is as much a legacy as the gold watch, &c.

Seys against Price.

Case 83.

Lincoln's-Inn-Hall, July 24, 1740.

RICHARD SEYS devises his lands to trustees, in trust for payment of debts and legacies ; and after payment of them, in trust for *Evan Seys* his cousin, and the heirs male of his body, with remainder over, in trust for *Charles Seys* in fee ; and bequeathed to the plaintiff *Elizabeth Seys*, his daughter, a legacy of three thousand pounds, to be paid at twenty-one ; and in the same will declared, that he had executed a bond to *Elizabeth* for two hundred pounds, and willed it to be paid her by his trustees out of his estate, among his other bond debts. *Evan Seys* entered upon the testator's death, and suffered a recovery of all the estate, except one hundred pounds a-year ; and afterwards, upon a treaty of marriage with *Elizabeth* the legatee, then an infant, enters into articles, whereby, in consideration of the intended marriage, and of her portion being the legacy of three thousand pounds and bond of two hundred pounds, both chargeable on *Evan's* estate, under the devise, he agrees and covenants with trustees to settle upon her for life as a jointure, and in bar of dower, one third part of the devised estate, being about three hundred pounds a-year. *Evan* and *Elizabeth* intermarry, and he dies without issue, having first made his will, and therein devised to his wife *Elizabeth* for her a jointure upon C. of one-third of the devised estate, which was about 300l. *per annum*, in bar of dower. The marriage took effect, and the wife survived, yet her *chofes in action* being the consideration of the settlement, shall not survive in equity. And this a good settlement, according to 27. Hen. 8. cap. 10. to bar the wife of her dower. But if, in consideration of the wife's fortune, which consisted of *chofes in action*, a husband settles an estate inadequate to such fortune and the degree of the wife, a court of equity will not take away that right which the law gives the wife to *chofes in action*. — S. C. Bar. Rep. Chan. 117. 2. Vern. 68. 507. 683. and post. 137, 138, &c. *La Noy v. the Duchess of Athol*, Adams v. Cole, Hilary Term, 9. Geo. 2. in Forester's Reports.

life,

SEYS
against
PRICE.

life, not only the one-third of the estate which he had before his marriage stipulated to settle upon her, but also the two remaining thirds ; and also made her his sole executrix. *Elizabeth* has brought her bill to have the legacy and bond raised out of the whole estate devised to *Evan* for her benefit ; and the equity she suggests is, that as she was an infant at the time of the marriage-articles entered into, she was not bound by them, and therefore relinquishes and waives all benefit from them, and claims entirely under the will ; and that the legacy and bond being *choses in action*, and never released to her husband, or extinguished by him, still remain subsisting and continuing charges on the estate, and either vest in her by survivorship at common law, or must be raised for her in equity as executrix.

HARDWICKE, Lord Chancellor. The general question is, Whether this legacy and bond, being *choses in action*, and never actually released to *Evan Seyes*, are not subsisting charges on his estate ? or, Whether, under the circumstances of this case, they are not extinguished and sunk into the inheritance ?

This may be considered in two lights : the one, whether *Elizabeth*, the plaintiff, is entitled in equity to these *choses in action* in her own right, by surviving *Evan* her husband, who never got them released ; the other, whether she is intitled to them *in autre droit*, as executrix to *Evan*.

As to the first, I will suppose, that the legacy and bond are subsisting charges on *Evan's* estate ; and viewing things in this light I am of opinion, that *Elizabeth* is not intitled in equity to these *choses in action* by survivorship ; and my reason for it is this : if a man, in consideration of an intended marriage with an infant, and of the infant's portion, make a settlement by way of jointure in bar of dower, which is good within the 27. Hen. 8. c. 10. and after a marriage is had, especially taking it that the wife is of the age of consent, and then the husband dies, this jointure in law will clearly bar her of her dower, and cannot be relinquished by her, *Co. Lit.* 37. b. ; for otherwise it would be very mischievous, and would make jointures on infants very precarious and uncertain, especially in noble families, where the young ladies are often married in their minority. Suppose a jointure were settled on a lady, not only in consideration of marriage, but also of her portion, which consisted of *choses in action*, and the husband die without altering their nature or reducing them to possession, the wife undoubtedly at law will be entitled to them ; yet I am of opinion, as she would be bound by the jointure before marriage, so the representatives of the husband would be considered in this court as purchasers of her portion by virtue of that jointure ; and though the legal interest of such *choses in action* vests in her by survivor, and she may have the action at law for the recovery of them, yet a bill by the husband's representatives may be brought to have the benefit of the securities, and for the wife to stand as a trustee for them, both which this Court will decree

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against
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decree for them, and will not let the wife have those things which were purchased from her by her jointure; I mean, if it appear that the jointure is adequate to her degree and fortune, and made without fraud; for if it was made by collusion in the husband, who settles on her some inconsiderable jointure on purpose to bar her of her dower, which would be a more ample provision; in that case, if the wife should be entitled to the legal benefit of *choses in action*, this Court would not, under such circumstances of hardship and confinement, take from her that provision which the law had given her; and this matter of fraud would be a rebutting equity in the wife, which she might set up against the equity suggested by the representatives of the husband. But it is objected in the present case, that there is no jointure that is effectual at law within the 27. Hen. 8. there being only an agreement by articles to make a jointure, which is not made; but such an executory jointure in equity will not be different from the case of an actual jointure at law; for articles entered into for a valuable consideration to do a thing which is not actually done, yet it shall be considered in this court as done; for they are favourites of a court of equity, which will esteem the present articles as a provision for the wife, will allow her the benefit of them, and deem her as much the owner of the estate in equity as if a legal settlement had been made pursuant to such articles; and the husband too is considered as much a purchaser of the wife's portion under this executory agreement as if it had been carried into execution; and this is within the case of *Blois v. Lady Hereford (a)*, where, though no mention was made of the wife's personal estate, as part of the consideration of the settlement, yet when, after the death of the husband, there appeared to be a *chose in action* which would belong to the wife at law, the Court would not let her have it by surviving her husband, but decreed it to his executors, and said, she ought not to have her jointure and fortune both; if so, *à fortiori* in the present case, where the *choses in action* appear in the articles to be the express consideration of them, and the husband intended to be a purchaser of them, they being her portion. It is farther urged for the plaintiff *Elizabeth*, that the husband having devised the whole estate to her for life, therefore she has no occasion and will not claim by the articles, but waives them, and makes her title to the whole by her husband's bounty under the will. But I apprehend the will makes no difference; for she can claim only two-thirds under that, for one-third she has a right to under the articles, as to which the husband was esteemed a trustee for her; and it is impossible he should devise that which he had parted with before, and had not at the time of the devise; and they having only one-third under the articles, concludes her from the benefit of her portion; for she shall not have both her portion, and the jointure which was given her in lieu of her portion.

An agreement by articles to make a jointure is equal to a jointure according to 27. Hen. 8. c. 10. in a court of equity.

(a) 2. Vern. 507. Eq. Ca. Abr. 68.

I shall

SEYB
against
PRICE.

Where a man agrees to settle an estate upon a wife or issue, and after suffers the estate to descend to the issue, or devises it to the wife; neither the wife or issue can, in such case, claim under the articles, for this equivalent is a bar.

2. Vern. 558.
Eq. Abr. 26.
pl. 5.

I shall view this in one other light. And suppose (without distinguishing one-third under the articles, and the two other thirds under the will) it be considered, that this devise of the whole estate for life is a satisfaction for what *Elizabeth* may claim under the articles, an ample satisfaction it is, for it is a satisfaction, and a great deal more. In this court, where a man agrees to settle an estate upon a wife, or issue of the marriage, and suffers the estate stipulated to descend to the issue, or devises it to the wife, Can either party, in such case, claim under the articles, when what is given or suffered to descend is a satisfaction? It is certain they cannot; for what is done in satisfaction of a thing, and is an equivalent to it, is taken in the same light as if the thing itself had been done; and therefore, if the devise in the present case be a satisfaction, it is the same in the eye of equity as the jointure itself; and so in this view she cannot claim both her fortune, and her jointure which was given in lieu of it.

What I have hitherto said, has been in respect to the demand made by the wife in her own right as survivor. I will now go to the other question, which is, If she is not entitled in her own right, whether she shall not have the legacy and bond *in autre droit*, as executrix to *Evan*?

A *chefe in action* of the wife's before marriage, and charged upon the husband's estate, shall not, after the death of the husband, survive, but shall be considered as merged.

And upon this point I shall not admit or suppose that the legacy and bond, under the circumstances of this case, are subsisting or continuing charges on *Evan's* estate in fee-simple, though his estate that was not comprized in the recovery will bear another construction; and I do not know any case, that where a person at full age, being absolute owner of an estate in fee, and also of a charge upon such estate, that the charge has been kept in him distinct from the estate, and after his death levied and raised out of it for an executor to the prejudice of an heir; for in the cases of *heretofore* and executor, which often happen, the general rule of the Court has gone in favour of the heir, for the benefit of the real estate, to prevent charges being brought upon it. Besides, this portion could not be raised in the husband's life-time by his wife, for he was both debtor and creditor, as being owner both of the estate and charge upon it; and the charge in his life-time is united to it and merged in it, and shall not, after his death, be severed from it. The case of *Thomas v. Kemish* (a) goes upon another reasoning: That was the case of an infant, who, everybody knows, has not an absolute power or ownership in his real estate until twenty-one, as he has over his personal estate in his infancy, which may be devised to pay debts, or may be distributed in legacies, by an infant; and if a young lady, who is a minor, has a personal estate, it may be a means to prefer her in marriage at a time when she is not capable of making a settlement of her lands; and the distinction has always been between an infant who had not an absolute command over his real estate, and one of full age who had;

(a) 1. Eq. Abr. 269. S. C. 2. Freem. 207. S. C. 2. Vern. 348 457.

and that where an infant is entitled to a personal estate, and also to a real one which is incumbered with debts and mortgages, the Court will direct the personalty to go in discharge of the incumbrances; yet it will not order the mortgages to be assigned to attend the inheritances, but still to be considered distinctly as personal estate for the benefit of the infant. But whatever I have said in relation to *Evan's* estate in fee-simple will fail me in the fee-tail estate of one hundred pounds a-year that was not comprised in the recovery, and wherein he had no absolute dominion or ownership; for as to these fee-tail lands and proportionable share of the three thousand pounds and two hundred pounds must be subsisting charges on them, and must be raised out of them in the hands of the remainder-man *Charles Seys*, for the benefit of *Evan's* executrix and his personal estate; for it cannot be presumed, that *Evan* intended it to sink for the benefit of a remainder-man who is a stranger to him, and makes no title under him, but claims *per formam doni* of *Richard Seys*, the first devisor.

SEYS
against
PRICE.

Where an infant is entitled to a personal estate, and to a real one which is incumbered, equity will direct the personal to go in discharge of incumbrances, but will not order mortgages to be assigned to attend inheritances, but still to remain as personalty.

DECREE *in part*. That *Evan* be considered as a purchaser of the portion of three thousand pounds and bond of two hundred pounds, by virtue of the marriage-articles; and that having suffered a common recovery before his marriage of the greatest part of the devised estate in tail, no more of the said three thousand pounds or two hundred pounds be raised than is proportionable to the value of such part of the estate as the said recovery did not extend to.

Sorresby against Hollins.

Case 84.

(BY CONSENT.)

Lincoln's-Inn Hall, August 6, 1740.

CASE. *John Naylor*, in 1738, after the statute of Mortmain, made his will in these words: "I will and desire that my executors, within twelve months after my decease, do settle and secure, by purchase of lands of inheritance, or otherwise as they shall be advised, out of my personal estate, one annuity or yearly payment of fifty pounds, to be paid yearly and distributed for ever, by my executors, their heirs and assigns, among the poor and indigent people of *Leke*, in the county of *Stafford*, in such manner as they shall think fit; and my will also is, that my executors do also settle and secure one other annuity of five pounds, to be paid yearly to the vicar of *Leke* for the time being, for ever, for preaching an annual sermon on every twelfth day of *October*;" and the testator devised the residue of his personal estate to be equally divided between his sisters *Mrs. Sorresby* and *Mrs. Hollins*.

HARDWICKE, Lord Chancellor. The only question in this case is, Whether the devise of the two annuities of fifty pounds and five pounds to charitable uses is void by the late statute of Mortmain?

A. by will desires his executors, within twelve months after his decease, to settle and secure, by purchase of lands of inheritance, or otherwise as they shall be advised, an annuity of 50*l.* to be distributed for ever by his executors, their heirs and assigns, among the poor of *Leke*. This is a good charity, notwithstanding the statute of Mortmain, by reason of the words, or otherwise.

It will.

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It is insisted upon by the plaintiffs, the residuary legatees, that it is void, because the direction of the devise is to settle and secure the annuity of fifty pounds by a trust of lands of inheritance; and that though the words "or otherwise" are added, they will not vary the case, for *Mr. Naylor's* intention was, to assure the annuity out of lands of inheritance. But I am of opinion upon this act of parliament, that this bequest is not void, and that there is no authority to construe it to be void, if by law it can possibly be made good. The act of parliament is not at all aimed against perpetual charities merely as such, or to prevent the establishment or creation of them, but is designed against the cases of perpetual charities in lands, and, as the title imports, to restrain the disposition of lands whereby the same become unalienable. The whole recital and enacting part of the statute take notice only of the unalienable disposal of land, whereby heirs are disinherited; and therefore the alienation or conveyance of lands to such purposes are prohibited; and though there is a clause to prohibit money being laid out in lands to such purposes as would make them unalienable, yet there is no restriction whatsoever upon any one from leaving a sum of money by will, or any other personal estate, to charitable uses, provided it be to be continued as a personalty; and the executors or trustees are not obliged or under a necessity of laying it out in land, by virtue of any direction of the testator for that purpose. Consider then, whether this clause and devise in the will fall within the restraint and prohibition of the statute. And in the first words they do fall within them, for the testator directs, that his executors "shall settle and assure, by purchase of lands of inheritance, &c.;" and if the testator had rested upon such first words, his devise would have been clearly void: but then he goes on in the disjunctive, "or otherwise, as my executors shall be advised;" and if a devise in a will is in the disjunctive, and leaves to the executors two methods to do a particular thing by, the one lawful and the other prohibited by law, Can any Court say, because one method is unlawful, that therefore the other is so, and the whole bequest void? No; for if one bequest is lawful, that shall be pursued and take effect. It has been further argued against the devise, that the words "for ever" shew the annuities must arise out of some real estate, which is only capable of supplying them for ever, for personal funds are too perishable and transitory in their nature to answer such everlasting annuities: and suppose a particular sum were vested in stock, with design to purchase a particular yearly sum or annuity, it may so happen that the Company may be quite dissolved, or that stock may fall, or interest be so reduced that half the annuity may not be produced. But these objections may be over-ruled; for if the Company should be dissolved, the principal stock may be taken out and vested in some other Company. And there may be annuities that may probably continue for ever, and yet not payable out of land; and I will mention an instance of one which has lasted a century and a half, and may exist perpetually; which is *Sir Thomas White's* charity, being a disposition of money to be employed by continual rotation in loans to poor tradesmen

Sir Thomas
White's Charity,
pay,

tradesmen of several sums to be let out for a stated number of years, and then to be repaid ; and any man may at this day give by will a perpetual charity in this manner. But if a man by will secures such loans by lands, or purchase of lands, his devise will be void, and contrary to the late statute of Mortmain. If this case had been to be considered by the Court before the act, it would, as the safest method to secure the charity for ever, have recommended and directed a purchase of lands ; but when this Court is precluded from doing it in this manner, if it can be obtained in any other, there is no reason to say the devise is void. It is said too, that the words "heirs and assigns" import a purchase in land or some real thing, for no personal thing can descend to heirs ; and if the money is to be revested in a personal security, it will not go to the heirs, but to the executors ; and so the intention of the testator not pursued.

I will suppose that an obligor binds himself, his heirs, executors, and administrators, in a sum of money to a papist, who obtains judgment upon the bond, and takes out an *elegit*. In this case, I think, it has been held at the assizes, or at least it might very well have been so held, that the papist cannot maintain an ejectment, and yet the bond is good to bind the person of the obligor and his personal representatives, but not to charge his lands, or his heirs who represent him in his landed capacity. And this comes up to the present case, which may secure the charity in a double sense, either upon land or personalty, if the law would allow both ; and if the law prohibits one only, it certainly allows the other : and I am of opinion upon the whole, that there is nothing that makes this bequest void in every part, but that it is good in that way which the law does not forbid. But I would not have it questioned, that if a man should by his will direct a sum of money to be laid out in land, or upon rent-charge to be secured upon land, for any charity, and in the mean time, till it can be so laid out, to be invested in Government securities, for the benefit of the charity, but that that bequest will be void, because the final end and intention of such testator was to dispose of his money in land ; and the investiture of it in Government and personal securities was but to secure it until a proper purchase of land or rent-charge offered.

As to the annuity of five pounds, there are fewer objections to that than the other ; for there is no direction at all for any money or personal estate to be laid out in land, for the executors are only willed to "secure and settle five pounds a-year, &c. ;" and it must be secured upon a personal fund, consistent with the will and intention of the testator, and not contradictory to the words of the act of parliament. It is often said in the old Books by the Judges, "I was by

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against
HOLLING.

If *A.* by bond bind himself, his heirs, executors, and administrators, to a papist, who obtains judgment, and takes out an *elegit*, such papist cannot maintain ejectment, yet the bond binds the representatives of the obligor.

It was said at the making the statute of Mortmain, that it would not hinder any charitable distribution of a personal estate. Therefore I decree the devise good, and the money to be invested of personal estate.

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invested in *South-Sea* stock, for the charitable purposes mentioned in the will.

In favour of the devise was cited *Porter's Case*, 1. Co. 16. *Contra*, *Roper v. Radcliffe*, in the house of lords, and *Adlington v. Lam*, before LORD HARDWICKE.

Case 85.

The Attorney General against Lord Gower.

Lincoln's-Inn-Hall, August 6, 1740.

The corporation of *N.* in 1684, leases to trustees for one

thousand years, to make improvements, in trust to permit the corporation, &c. to dispose of rents and profits to the use of minister and relief of poor inhabitants, and to no other uses whatsoever.

The corporation continue in possession, and make orders until

1735, and lessees do not intermeddle therewith: and in 1735 the executor of surviving trustees assigns this lease; and the Lord Chancellor refused to establish this term, but established the charity, which had continued and been complied with from the making of the lease; for such long usage, he said, was an evidence that there was the like claim before lease made, as there was no evidence to the contrary.

S. C. Bar. C. R.

245. 132.

LORD CHANCELLOR HARDWICKE's opinion upon consideration of this cause, which was argued last Trinity Term.

This is an information brought in the name of the attorney-general, at the relation of several of the tenants of some part of the charity-estate in question, and at the relation also of the inhabitants of the borough and town of *Newcastle-under-Lyne*, in the county of *Stafford*; and there are no other relators; but *Mr. Crew Offley* and others are complainants with the attorney-general, who are assignees of a term of one thousand years by assignment in 1735; and this information is for several purposes.

FIRST, To establish a lease made by the corporation of *Newcastle*, on the thirteenth of *October* 1684, of all their lands and real estate, by very comprehensive words, to *Sir Thomas Billet*, *Justice Turton*, and four others, for one thousand years, upon certain trusts.

SECONDLY, To have the benefit of that term, and of the assignment of it made in *May* 1735, by the executor of *Mr. Justice Turton*, the surviving trustee, in such lease, to the plaintiff, *Mr. Crew Offley* and others, co-plaintiffs with the attorney-general.

THIRDLY, To establish certain charities concerning which it is charged in the information that the estates now in question, and the term comprised in the lease, are subject; and for an account of the profits of the estate; and to set aside some absolute conveyances made by the corporation of part of the charity-estate included in the trust-term; and also to set aside two leases, one to *Lord Gower* of several houses and cottages, and the other to the defendant *Mr. Bourne*; and that the new trustees may be quieted in the possession of such part of the premises for which some of the tenants have attorned, and to compel the other tenants of the residue to attorn to them; and that they may be put in possession of that part of the estate.

One of the principal points in dispute arises upon the lease of 1684 and the assignment in 1735; and to determine how far this Court can interpose in establishing the term, as it is granted to the assignees, it will be necessary to consider the circumstances under which this case was made. It is well known, that in the year 1684 there were arbitrary and illegal practices all over the kingdom

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to procure the surrenders of the charters of corporations, which extended to the borough of *Newcastle*; and it appears, that an information had been brought against it to evict its charter, and that the corporation was dealt with to surrender it to the crown. Upon which occasion, on the fifteenth of *October* 1684, which is the date of this lease, it appears in the corporation books, that there was an order then made, by which it was agreed, at a corporate assembly, that the charter, and all the lands, &c. which the members enjoyed in right of the borough, should be surrendered into the hands of the king; and that *Sir Thomas Billet* and another gentleman should carry the surrender to *London*, and present it to his majesty by the hands of the Chief Justice of the King's Bench; and that they should endeavour to procure a new charter; and this instrument or order was made under the common seal of the town, to empower *Sir Thomas Billet* and the other accordingly. But it was further ordered, that before the surrender of the charter, a grant should be made to *Sir Thomas Billet*, *Justice Turton*, and four others, of all the lands, &c. whereof the mayor, burgesses, and bailiffs were seised, in the right of the corporation, for one thousand years next ensuing, upon trust, to permit the said mayor, &c. to dispose of the rents and profits thereof for the maintenance of a minister in the said borough, and for the relief of the poor inhabitants, as the mayor, bailiffs, &c. should think fit, and to no other uses whatsoever; and by indenture of the same date, a lease is granted, pursuant to the terms mentioned in the order, between the corporation of the one part, and *Sir Thomas Billet* and five others of the other part, reciting, that whereas the mayor, &c. were seised of the lands, &c. in question in fee, and that whereas all or the greatest part thereof were in the occupation of several burgesses, the profits thereof are applied for the relief of the poor and maintenance of a minister; and whereas the poor increase daily, the corporation grants the premises to *Sir Thomas Billet* and the other trustees for one thousand years, at a pepper-corn rent, upon this special trust and confidence, that the lessees should make what improvement of the estates they could, and dispose of the rents and profits to and for the maintenance of a minister and the relief of the poor, in such proportion, and at such times, as the mayor, &c. should request or direct; and in case the borough should be disincorporated, or there should be no mayor, &c. then in such proportion, &c. as twenty-one of the inhabitants of the same town, or the greater part of them, to be chose on the first *Friday* after every *Michaelmas*, should direct; and in case of any overplus over and above the maintenance of the poor and the minister, then to apply it to other public and charitable uses, in such form, &c. as the mayor, &c. and in case of no mayor as twenty-one inhabitants, &c. should think fit; and upon further trust, that the lessees should make assignments or grants, for such terms, and upon such covenants, rents, fines, &c. as the said mayor, &c. or if none as the twenty-one inhabitants, &c. should require,

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I have now taken notice of the lease, and the circumstances under which it was granted, and it does not appear to me, that any of the lessees had possession of any part of this estate; but it appears, that the corporation, though they surrendered their old charter, and had taken up a new one, and acted under that, yet they were after, in *James the Second's* reign, restored to their old charter, and continued in the receipt of the rents and profits; and by entries in the corporation-books, orders were made from time to time, by the mayor, &c. for the management of the estate, as owners of it: and it does not at all appear that the lessees intermeddled with it; and from the year 1684 until 1735 this lease lay dormant and unthought of, and was then accidentally found among the writings of one of the lessees then deceased, and an assignment made by the surviving executor of *Mr. Justice Turton*, who survived the five other lessees; upon the making of which this information is brought to have the benefit of it, and to establish the term of one thousand years; and relief consequential upon it is prayed.

The first consideration therefore is, What ground there can be for the relief that is prayed to establish this term? And I think there is none, because of the circumstances and intention for which this lease was granted, and the subsequent facts that have happened since. The occasion of this grant by the corporation was to protect their estate and possession from the consequences of such illegal practices as were carried on against them at that time to compel them to surrender up their charter, and make a present of their liberties to the crown; and by the above order this appears to be their intention in regard to the granting this lease to the trustees. It is said, indeed, that this was done with a design to deceive the crown; but however I cannot much blame them for it, for what they could do according to law to screen and protect their estates from such cruelty as was offered them, they were well justified in doing; and I do not think there was any prejudice to the crown, for it aimed more at an influence and power over their persons than estates. Besides these estates that moved to the corporation from the hands of private donors, and the corporation leases or is dissolved, the land will not escheat to the crown upon their dissolution, because, as *Lord Coke* says in his *First Institute*, 13. b.

If lands are given to corporate bodies, and corporation leases or is dissolved, the land will not escheat, but will revert to the donors.

Coke's Inst.

3. b.

if lands are given to corporate bodies by private donors, and the corporation leases or is dissolved, the land will not escheat to anybody, but will revert to the private givers. After this lease was granted, the old charter surrendered, and a new one taken up, *King James the Second* published a proclamation, declaring the new charters of all corporations to be void, and that all corporations might be at liberty to act under their old ones. It appears, that *Newcastle* deserted its new charter, took up its original one, and acted under that. It happened, that all the corporations in the kingdom (except *London*, for which a particular act of parliament passed to restore its corporation to its antient footing), by virtue of this proclamation, subsisted upon their old charters; and all illegal acts done under the new charter were rescinded, as also all acts done

in prospect of the surrender of the old charter were to be done away in like manner, and therefore this lease ; it being an act the corporation was obliged to do to shelter their estate ; and it would be hard, after the crown has quitted its advantages, to set up this lease, now the new charter, which was the foundation of it, is abolished ; and it is plain the borough made this lease merely to guard their estate, for they have made a provision in case of a disincorporation, which was by setting-up an assembly of twenty-one, of their own authority : and therefore, for all these reasons, I am of opinion, that it is not fit to set up this term and estate of the trustees, in respect of the circumstances under which it was granted ; for the inconvenience which the corporation apprehended has not happened, and the mayor, &c. have continued for a great length of years in the possession, have made leases, &c. and done the highest acts of ownership without interruption.

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It has been insisted for the defendants, that the evidence that arises from the want of possession in the trustees, and the acts of ownership of the corporation, notwithstanding the lease, proves, that this lease was either refused by the trustees, or amounted to a surrender in law. And it must be admitted, that it is as strong a presumption as if the surrender had been actually made at common law. But there is no occasion to enter into that, though it is strong reason why equity should not interpose and carry it farther than at common law, by interposing and giving assistance to the trustees. The possession of the trustees must be founded upon the lease ; and if the trustees had entered, they would have been barely trustees to the corporation, and subject to the control of the governing part of it ; and so are the clauses of the lease, though the profits are to be applied for charitable purposes, and leases are to be made, but the same are to be as the corporation should direct, or the twenty-one inhabitants in case of a disincorporation ; and if so, what ground is there for equity to take away the possession of *cestui que trust*, for in this respect the point of authority is to be considered. Is the possession of the *cestui que trust* to be delivered to the trustees, unless there is some gross mismanagement ? No ; equity never takes away the possession from them, whether they are possessed for their own benefit, or for a particular purpose, without some reason for it ; and I think there is no ground for it here, especially after the great length of time,

The next consideration is, as to the establishment of the lease ; and if there is no decree to establish the term of one thousand years, the consequence is, that the assignment must fall of course. But there are more objections to the validity of the assignment than of the lease, though it is liable to all the objections of the original lease ; for this assignment was made after the term of fifty-one years, during all which time the lease had laid dormant and unheard-of ; and when it was found by accident, the assignment of it was made without the approbation of the *cestui que trust*, and by the executor of the surviving trustee, without applying to this Court for any

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direction ; and I am of opinion that, upon these circumstances, it would be impossible to establish the assignment. If the term and assignment, therefore, cannot be set up, then whatsoever is prayed and built upon that foundation must sink ; and it is clear, no direction can be given for quieting the new trustees in any part of the premises, or for delivering possession, or compelling the tenants of any part of the charitable estates to attorn ; therefore that part of the information that sought these several reliefs must be dismissed.

What remains is the general relief arising upon that part of the information wherein the attorney-general is proper plaintiff to establish the charity in the name of the relators. And it is insisted for the relators, that, whatsoever should become of the term or authority of the trustees or assignees, it appears, that this estate, and the profits, are applicable to charitable uses, which this Court ought to establish : and the relators are right there, for it does appear that there is a charity which this Court ought to support, though the information mistakes the manner and form of it ; yet there is no instance of an information being dismissed for that, but the Court has established the charity according to what the case requires. The defendants object, that it does not appear that there is sufficient evidence that the estate in question is a charitable one, or that the profits are applicable to charitable uses, but that the estate in general is the corporation's, applicable to their common use, as to such as they shall think fit and direct. This question depends upon the evidence arising out of the original lease, in 1684, and out of the usage that has been since the making of it, which is now fifty-six years ago. As to the evidence, there is a strong proof that the rents and profits are applicable to the charitable uses therein-mentioned, for it is so expressly recited in the lease ; which uses were for the relief of the poor, and maintenance of a minister for the borough, and other public and charitable uses therein-mentioned. This is an use abstracted from, and independent of, the trust afterwards declared ; for if it had been barely a trust, it might have been said, that in case the lease cannot be made good, the trusts shall fail ; and this is evidence that, antecedent to the lease, the rents of the estate were applicable to the same charitable uses. And though it has been suggested, that the mentioning these uses in the lease was to give a better colour to it, yet I cannot presume that, unless there is evidence of a different application prior to this lease, and that the rents had been differently disposed of. It does appear by the entries of the town's books, that this charity moved from private donors ; and if the usage has been for fifty-six years, that is a strong evidence to shew, that the recital in the lease was true, because a long usage within memory must be received, and implies the same usage to have been in being before in the very same manner, without some contradictory proof. This charity, indeed, has been applied in no uniform, but in a desultory manner, for the corporation sometimes allowed the minister more and sometimes less, but the poor were continually maintained out of the estate, for no taxes have been levied. It appears, that the corporation

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tion has placed out poor apprentices, which is another charity to which the estate is to be applied; and this usage is to be taken very strongly in this, for the corporation has resorted to its old immemorial charity, which is quite antecedent to this new lease, which must be taken to be abolished. So I am of opinion, that this estate is to be taken to be a charity, and the profits must be applied to such uses. But I shall consider how the charity is to be in regard to the minister; and as to him, it must be established and made certain, for the corporation giving him at one time less than at another was a breach of their trust, therefore that must be sent into an enquiry before the master, to see what shall be allowed such minister. In respect to the poor, the profits must be applied for putting poor children apprentices, and the manner of applying it must be left to the corporation.

The last point, as to the conveyance of part of the charity estate and the leases, particularly those to *Lord Gower* and the other to the defendant *Bourn*: As to the absolute conveyances of any part of the estate since the making the lease in question, it appears, some of them have been made of only very small estates of no great value; and it does not appear, that the grantees had notice of this term of one thousand years, or of the trust; and in particular, *Lord Gower* had not notice, upon his having lands given him by the corporation for making their streets more uniform; and I think, the corporation is only to account for the purchase-money. As to the leases to *Lord Gower* and the other defendant *Bourn*, the information prays to set them aside, upon the head of notice, and as not being made for full rent, but at too low a one. As to the notice, there is nothing that affects *Lord Gower*, though there is something to affect the other defendant *Bourn*, for he was town-clerk. But I am of opinion, be there notice or not, if these leases are made at a full rent, that it is a proper management of the estate within the charitable use; for as the trustees have not taken possession or acted, or if they had they must have acted according to the direction of the corporation; and if it had directed them to have made leases they must have done so, and if they had done so there would have been no ground to set them aside; the value of the leased lands comes out to be uncertain and doubtful; and that appears from the general nature of the evidence, for the relators go according to the judgment of persons that set the present value; but that is very uncertain; for here are a parcel of old houses, and they compute what they may be let for, from which others may differ. On the other hand, the defendants ground their evidence upon the small rent reserved annually by the corporation before the grant to the two defendants *Lord Gower* and *Mr. Bourn*; but that valuation is as uncertain as the relators evidence, because the town might suffer the poor to live in them at a very small rent, as they were part of the charity estate, and amongst other uses applicable to the support of the poor; therefore, the Court not being able to make a perfect judgment of the value, there must be an enquiry before the master, Whether these leases were at an adequate rent? for I will not say a full rent.

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Decree.

Therefore the information, so far as it seeks to establish the term of one thousand years to the trustees by the lease in 1684, or assignment thereof to plaintiff *Grew Offy* and others, dated 1735, or to quiet the assignees in the possession of any part of the premises therein comprised, or to compel the tenants of any part thereof to attorn to the same assignees, be dismissed. But I do declare, that the rents and profits of the same estate ought to be applied to maintenance of a minister and relief of the poor of the said town of *Newcastle*, and to the several other public, pious, and charitable uses in the said indenture of lease of 1684 recited and mentioned; and that the said charity be established. And let it be referred to the master to take an account of the rents and profits of the premises comprised in the said lease reserved by the corporation since the time of the filing of the said information, and how and to what purposes they have been applied and disposed. Let the master enquire, what has been allowed, or is reasonable to allow, yearly, out of the said rents and profits, for the maintenance of a minister, as so much as has been allowed, &c. be paid to him by the corporation, but the quantity of such payment to be subject to the further direction and order of the Court (Then follow directions concerning the poor). Let the master further enquire, what part of the lands comprised in the lease has been sold by the corporation since the lease of 1684, &c. and state the same, &c. and reserve the consideration of the money raised by such sale as to the disposal of it, &c. and take an account of the annual value of the premises, &c. comprised in the leases for the two defendants *Lord Gower* and *Mr. Bourn*; and of the rent reserved, &c. and whether it be adequate or sufficient or not, &c. Reserve all further directions, &c.

Case 86.

Pomfret against Murray.

Westminster, Michaelmas Term, 14. Geo. 2. 1740.

A. devised his real and personal estate to *B.* an attorney, who made the will, and *C.* in trust to invest the personal estate in land, and settle the same on the defendant for life, with remainders over, and made the plaintiffs executors, and gave them 20l. a-piece. The plaintiffs refuse to prove the will, unless the defendant would give them 300l. viz. 100l. to *B.* and 200l. to *C.* The defendant covenants to pay these sums accordingly; and the plaintiffs having proved the will file their bill for the allowance; and the Lord Chancellor refused satisfaction principally for that the plaintiff was an attorney, and from the evidence it appeared, he had urged difficulties to extort this allowance from the defendant; though, he said, there might be cases where such allowance would be established.

LORD

POMFRET
against
MURRAY.

HARDWICKE, *Lord Chancellor*. This is a case of great consequence, and of such a nature as I have not known come before this court; and it is incumbent on the Court to proceed warily before they allow such a demand. It has been objected, that a bill ought to be brought by the defendant to set this deed aside. But I am of opinion, that the defendant is proper to insist on his objection to this allowance in his answer; for as the plaintiffs have brought a bill for an account, and to have these two sums allowed, if the defendant is right in his objection, the plaintiffs ought not to have this allowance. If so, then the question arises on the merits. The points are two: FIRST, On the general reason, if any agreement of this kind ought to be allowed to take place? SECONDLY, Supposing some such agreement might be good, whether this can stand? As to the first, Whether an agreement may be made by the *cestui que trust* with the trustee to make an allowance which shall be binding, I think there is no occasion to determine. I should think there may be such a case, though this Court will be very tender: All courts of equity have considered trusts as honorary things; they burthen the party in honour, and in their nature are not things which he should make an advantage of. Another reason is, that a trustee who has the estate of another vested in him has a great opportunity to make use of the power he thereby gains to distress the party, which this Court cannot prevent; therefore this Court has always held a hard hand upon them; yet possibly a case may arise where a trustee may say, "I will not take upon me the burthen of the trust, unless you will make me an allowance:" and if he make no ill use of the power he has over the *cestui que trust*, I will not say the Court will not make such allowance. But I am of opinion, that is not the present case; I think here is evidence of imposition, and an abuse of the power they had in their hands. Pomfret, a man of law, is employed to make the will; is one of the persons named executors, whether by his own procurement does not appear; he has a legacy; and the general rule is, where executors have legacies, it is presumed to be for their trouble; if he had thought fit to have renounced the executorship, he must have lost his legacy. Pomfret, being an attorney, was likely to make an advantage of this trust, for there must naturally be a cause. The testator died the first of June; the next day there is a meeting to consider of the probate of the will. Pomfret then says to the defendant, "Your uncle has put me in trust, I cannot go through with it unless you will give me more money." The defendant answered, "You should have made that objection when you made the will;" and asked what he would have. To this Pomfret said, he would be moderate; he would have only one hundred pounds. The defendant does not acquiesce; but said it was too much; he was willing to double his legacy, or he would take out administration himself. To this Pomfret answers, No; he would hinder him. It has been said, the plaintiffs were at liberty to prove the will or not; that the defendant knew his power that he might take out administration: but that is not the point; it does not go on a

POMFREY
against
MURRAY.

misunderstanding of the law, but the ill use they made of the power they had. The defendant had got trustees who declared, they would not prove the will, nor let him have administration; if he had sued for administration they might have delayed him, and after all have proved the will. I consider the case in this light: Here are two executors who make use of their power to extort this reward; therefore this differs from the case of a trustee coming fairly and saying, "I will not take upon me the trust, but renounce, if you will not make me an allowance." The personal estate vested in them, and could not be divested but by their renouncing, nor the real estate but by a conveyance. The recital in the deed of covenants, that it was at the defendant's request, is false, and may be compared to a marriage brokerage-bond not improperly, for that is as voluntary as this; yet the Court will not suffer such bond to take place; and that is an answer to the plaintiffs turning the fraud upon the defendant. I think, on these circumstances, these allowances ought not to be made.

Case 87.

Ex parte Gumbleton.

Michaelmas Term, 14. Geo. 2. 1740.

Chancery will not grant a *supplicavit* on the affirmation of a Quaker.

S. C. 2. Atk. 70.

HARDWICKE, Lord Chancellor. The present case is a motion on the behalf of a Quaker for a *supplicavit* of the peace against her husband on an affirmation. There have been a great variety of cases which have had relation to this. I find two precedents in point directly contrary to each other. One is the case of *Hilton v. Byron* (a): the account I have of that case is, One Hilton prayed an attachment *pro pace* against one Byron, and offered to make an affirmation; but this being a criminal matter, the Court would not grant it without oath; this was on articles of the peace exhibited in the court of king's bench. Notwithstanding this case, in the case *Ex parte Greaves* (b), a *supplicavit* issued out of this court on an affirmation; but I take it for granted it passed *sub silentio*; and I believe it was first moved in the court of king's bench; and that Court did take notice of it, and refused the motion.

THE LORD CHANCELLOR refused to give any opinion without advising with the Judges; and denied the motion.

(a) Easter Term, 12. Will. 3. reported
3. Salk. 133.

(b) On the 14th May, 11. Geo. 2.

Crop against Norton.

Case 88.

Michaelmas Term, 14. Geo. 2. 1740.

THIS was a bill brought by the plaintiff against *Thomas Norton* and *Robert Norton* his son, and others, to have a specific performance of articles, whereby *Thomas Norton* covenanted to convey a leasehold estate to the plaintiff. The case appeared to be, That *Richard Norton*, deceased, was possessed of the estate under a lease from the *Bishop of Winchester* for three lives, of which his own was the surviving life. That in 1722 this lease was surrendered, and a new lease granted to *Richard Norton* and his heirs for his own life, and the lives of *Thomas Norton* and *Robert Norton*, relations to him. *Thomas Norton* paid fifteen hundred pounds for this renewal. That by deed-poll, dated the day after the lease, *Richard Norton* declared, that after his own death *Thomas Norton* should enjoy the estate for his life, and that *Robert Norton*, son to *Thomas*, should have it after his death. That *Richard Norton* continued in possession until his death; after which *Thomas Norton* mortgaged this estate to the plaintiff, and in 1734 *Thomas Norton* surrendered the lease, and took a fresh one for his own life, and the lives of *Robert Norton* and *John Crop*, the plaintiff's son; and in consideration of a further sum of money covenanted to convey to the plaintiff. There was a cross-bill by *Robert Norton* against the plaintiff and defendant *Thomas Norton*, to have a performance of the trust of the deed-poll.

Upon this case the question was, Whether *Richard Norton* should be considered as a trustee only for *Thomas Norton* in the renewed lease of 1722? or, Whether *Thomas Norton* should have it for his life only, and afterwards to *Robert Norton*, according to the deed-poll?

MR. ATTORNEY-GENERAL for *Robert Norton the son*. The right *Thomas Norton* sets up is, that he is a purchaser of this estate by paying fifteen hundred pounds for the renewal of the lease. As to this it is clear, that *Richard Norton* was proprietor of the lease at the time of the renewal, and had a right of renewal, and that he did not design to give it up, for he enjoyed it during his life. They do not pretend there is any declaration of trust but the deed-poll we mention. The deed-poll is produced by the mortgagee; and it is admitted it was put into his custody by *Thomas Norton*; but they say it was to shew he paid the fifteen hundred pounds. *Richard Norton* was the proper person to declare the trust. This is the title of *Thomas Norton*, and must bind him; for he cannot set up an implied trust in opposition to this declaration of trust. As to *Crop*, he had notice; he has not the legal estate; *Thomas Norton* had no power to surrender; and we do not claim under *Thomas Norton*, but prior to him.

decreed, that it was not a resulting fine for *B.* and that he had no power to article for such sale; that if the whole consideration for the new lease had moved from *B.* it would have been a resulting trust for him; but the new lease was made not only in consideration of the fine, but of the surrender of the old lease.—S. C. 2. Atk. 74. S. C. Bar. C. R. 179.

MR.

CROP
against
NORTON.

MR. LLOYD for *Thomas Norton*. This is not one of those leases that go *successive*, as named in the lease. *Richard Norton* could not have a right to renew, because the bishop might have let the lease run out: *Thomas Norton* paid the whole full consideration; the lease was made to *Richard Norton* and his heirs. If it had rested there, it would have been a trust for *Thomas Norton*, who paid the money. *Richard Norton* only changes his life in one lease for his life in another. There was nothing unreasonable or imprudent for a father to keep the estate in himself; though in the case of a son it was unreasonable. *Richard Norton* should insist on his putting it out of his power. Nothing moved from him but his assent to the renewal. *Thomas Norton* has denied that he knew the estate was to go in this manner. The last thing is the deed-poll. We deny we knew of it until after *Richard Norton's* death. This deed-poll is dated the day after the renewal of the lease; and recites; as soon as he heard of the renewal, in case of death he did, &c. It takes notice, that he had permitted *Thomas Norton* to renew in his and his son's name; and goes on and says, "I do give, &c." It is absurd for him to say so, when he had nothing to give.

HARDWICKE, Lord Chancellor. That is the point in dispute. The question is, Whether the plaintiff is entitled to have a performance of these articles as against *Thomas Norton*? for there is no ground to compel *Robert Norton* the son to join. This general question depends on the question, Whether *Thomas Norton* appears to have a title to this estate? for if he has not, this Court will not decree an impossibility. It is agreed, that *Thomas Norton* has not the legal estate; the question then will be, Whether he has the equitable one? for if he has, this Court will decree a performance. That question will depend upon two considerations: first, The circumstances of the transaction between *Richard Norton* and *Thomas Norton*, as to the renewal then made, and the consequences resulting from that transaction; and, secondly, the deed-poll.

As to THE FIRST, *Richard Norton* was absolute owner. It is true he had but one life, but that is a valuable estate; and though he had but a life, he had a power of renewal, tho' such as the bishop could refuse; but as to all other persons it is considered as a right; and if the lease be afterwards renewed, the new lease shall follow the antient trust; which shews this Court considers it as a right. This being so, *Thomas Norton* was his relation. It appears, that he thought fit not to renew himself, but to permit *Thomas Norton* to renew, provided he would pay the fine. What was the original agreement does not appear. It does appear that all the letters are not produced. I do not say that *Thomas Norton* could have produced them. But if all were produced, it is not probable they would shew the agreement, for the first letter takes notice of it as a thing known; but there is an expression in one of them which may afford some light; that is, *Richard Norton*, in his letter to *Thomas Norton*, says, "I would not in your case omit it; it lets you into the estate," and

CAUSE
AGAINST
NORTON.

"and those after you." On the thirteenth of *August 1722* the lease is renewed. What was the consideration? It was the surrender of the former lease; and I believe you would find no other consideration. The renewed lease is granted to *Richard Norton* and his heirs for his own life, and the lives of *Thomas Norton* and *Robert Norton*. The whole estate in law vested in *Richard Norton*. It is taken for granted by the Counsel for *Thomas Norton*, that there would have been a resulting trust for *Thomas Norton*. But I should be of a different opinion. The ground they go on is this, that where a purchase is made, the purchase-money is paid by one, and the conveyance taken in the name of another, there is a resulting trust for the person who paid the consideration; but this is where the whole consideration moves from such person; but I never knew it where the consideration moved from several persons, for this would introduce all the mischiefs which the statute of Frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase-money by the deed appears to be paid by him only, I do not know any case where such persons shall come into this court, and say, they paid the purchase-money; but it is expected there should be a declaration of trust. This case comes up to the present. It might be a question, Whether this fifteen hundred pounds was advanced by way of loan, or as the purchase-money? This therefore is far from being a clear case, that if there had been no declaration of trust, it would have been a resulting trust for *Thomas Norton*. But then there is the deed-poll under the hand and seal of *Richard Norton*, which recites the lease made the day before, and goes on: "KNOW YE THEREFORE, that having given my consent that *Thomas Norton* should renew, I do declare my meaning is, and my desire always was, that *Thomas Norton* and his son should have, &c. I do hereby give, &c." Now this is a plain declaration of the trust by a person who had the legal estate, and therefore a right to declare the trust. But then it is said, it would be hard to let him alone declare the trust, and give away the interest *Thomas Norton* had purchased. I think this is part of the same transaction. The deed-poll bears date the day after the lease. It is said, "I am ready to give other security on delivering up of this." Therefore it is plain, his intention was to deliver this, and not to keep it himself. I take it was delivered to *Crop* after the mortgage; for though it is a fact capable of being proved, that this deed-poll was found among *Richard Norton's* papers, yet it is not proved. Therefore I do not take it to be clear, that this was a private declaration. But suppose it was, if the lease had been for his own, *Thomas Norton's*, life, and for the life of a stranger, there would be something in the objection, that it could not be supposed that *Thomas Norton* would give so much for such an interest; but as it is for the life of *Thomas Norton's* own son, the objection falls; and it was natural for *Richard Norton* to insist on, and for *Thomas Norton* to consent to it. Therefore I think, from the nature of this transaction altogether, there is no ground to consider this as a trust for *Thomas Norton*. But as there is a declaration of trust by a proper person, I must

Crop
against
Norton.

I must take it on that, and therefore can take *Thomas Norton* to be owner of this estate for his life only. As to the lease in 1734, the estate must go in the same channel; but whether he shall be considered as an incumbrancer for the fine is a consideration; therefore I cannot decree a performance of these articles.

Then as to the next question, on the cross-bill, if my opinion is right, the plaintiff *Robert Norton*, as against *Thomas Norton*, is entitled to have the deed-poll brought into court. But as against *Crop* it is objected he is a purchaser; it is not sufficient that he is a purchaser, but he must be a purchaser also without notice. On the articles he had notice, but on the mortgage he had not. It is material to me, that it does not appear that he had any legal estate; for the legal estate which was in *Richard Norton* is in his heir at law; for there is no surrender of that lease, and he is a trustee for the person who has the right. I think, the deed-poll must be brought into court for the benefit of all parties.

Case 89.

Hodsell against Buffell.

Lincoln's-Inn-Hall, December 5, 1739.

A term on trust for a life; then to the heirs of the body of A. begotten, or to be begotten; by B. her husband, and to their executors, administrators, and assigns; and for want of such issue, then over to C.; this is a good limitation over to C. (a).

S. C. 2. Atk. 89.
S. C. Bar. C.
195.

HARDWICKE, Lord Chancellor. *Edward Buffell* being possessed of a term for fifty-nine years in reversion, after the expiration of a prior term, by indenture, dated the twentieth day of *January 1731*, assigned it to trustees, their executors and administrators, upon the following trusts: **FIRST**, In trust to raise a ground rent to be paid to the chief landlord, and subject thereto, "in trust, that the trustees shall permit the defendant, *Grace Buffell*, wife of *Edward Buffell*, to receive the rents and profits of the term of fifty-nine years, for and towards her better support and maintenance, if she shall so long live; and after her decease, to the use and behoof of *Edward Buffell* the husband for life; and after the decease of *Grace* and *Edward*, in trust for the heirs of the body of the wife begotten or to be begotten by *Edward* the husband, and to their executors, administrators, and assigns, for and during the rest and residue of the said term; and for want of such issue, then in trust for the separate use of my wife's daughter, *Henrietta Hodsell* (the plaintiff's wife), for life; and after her decease, then to the use of *William* and *Edward*, sons of the said *Henrietta Hodsell*, their executors and administrators, for and during the residue of the said term."

Edward Buffell, the assignor, who created the term, is dead without ever having issue by his wife, who survived him, and is defendant before the Court. *Henrietta Hodsell*, the daughter, who has a remainder in this trust-estate, together with her husband and son *Edward*, have brought their bill against the widow and trustees to have the deeds and writings relating to the leasehold estate, and to

(a) See *Brooks v. Taylor*, Moseley, Dougl. 470. *Marsh v. Marsh*, 1 Bro. 188. *Stephens v. Stephens*, Cases T. T. C. C. 293. *Knight v. Ellis*, 2 Bro. 228. *Sheffield v. Lord Orrery*, 3 Atk. C. C. 570. *Hockley v. Mawby*, 3 Bro. 287. *Pelham v. Gregory*, 5 Brown's C. C. 82. *Fearne Cont. Rem.* 407. P. C. 435. *Fonnereau v. Fonnereau*,

have the deed of trust brought into court, to be secured for the benefit of all parties.

HODSELL
against
BUSSELL.

The general question is, Whether the plaintiffs are entitled to have a decree for securing these deeds and writings? and that depends upon the interest they have in the term. Against this interest claimed by plaintiffs, which is to have the benefit of this term after the death of *Grace Buffell*, there now appearing no issue by her late husband; the objection by defendant is, that the limitation to the plaintiff and son is too remote, and what the law will not allow of in the case of a term for years, or trust of a term: and two reasons have been relied upon from the deed and nature of the trust.

FIRST, As this deed is penned, the whole trust of the term is vested in the defendant *Grace Buffell*. But if that be not so, yet, SECONDLY, That the trust of the term is disposed of in contingencies to the heirs of the body of *Grace Buffell*, by *Edward* her husband to be begotten; and that if there had been such heirs of the body, they would have taken the whole trust of the term; and the event of there having been no such issue of *Grace Buffell* will not vary the case. These objections are made to shew, that the limitation over to the plaintiff is too remote.

As to the first, I am of opinion, that the whole trust of this term is not vested in the defendant *Grace Buffell*. It appears, that the words "heirs of the body of *Grace Buffell* begotten, or to be begotten, by *Edward* her late husband," are words of purchase, and a description of the person, and not words of limitation.

It was admitted on both sides, that the words "heirs of the body" or "issue" may be words of purchase, and the authorities in the Books make that extremely plain, according to the circumstances of the case; and though the words are strictly words of limitation, yet they may be words of purchase. *Archer's Case* (a) is strong to that purpose; and in that case, to make the first take and have only an estate for life, the resolution did not turn upon the words "heirs male of the body," being in the singular number, but upon this, that the words of limitation being, "to the next heir male of *A* and the heirs male of the body of such heir male," those later words were superadded to the first words. In the case of *Lisle v. Grey* (b), *Sir Thomas Raymond* goes further than that; and though there is a difference in the Books, whether that judgment was affirmed in the exchequer-chamber; yet *TRACY, Justice*, in the case of *Legat v. Shewel* (c), takes notice, that he looked into the record, and found that it was affirmed. Those limitations are of estates of inheritance, and the last of them is in

The words *heirs of the body*, or *issue*, though strictly words of limitation, yet may be words of purchase.

Eq. Ab. 383.
pl. 4.

(a) 1. Co. 63. This was a devise to the next heir male of *A*. and the heirs of the body of such heir male. 114. S. C. 2. Show. 6. S. C. 2. Atk. 91. S. C. 1. Freem. 462.

(b) Raym. 278. 302. 315. 2. Lev. 551. Rep. in Eq. 141. 1. Peer. Wms. 223. S. C. Pollexf. 582. S. C. 2. Jones, 87.

the

HONSELL
against
DUSSELL.

Donn v. Merri-
field, at the
Rolls, 27 Oct.
4 Geo. 2. not
to be relied on,
though like the
present case, &c.
The Court gave
no opinion.

the case of a deed. If in the case of estates of inheritance, in which it is proper to admit of strict limitations in tail, the words "heirs of the body" may be turned into, and considered as, words of purchase, and not limitation, it will not be wondered at that, if in the case of a term for years (which do not properly receive a limitation in tail, in which words of limitation are not proper to be used), such limitations have also been made. Several cases were cited, viz. *Peacock v. Spooner* (a), of which case I very lately, in the case of *Villers v. Villers* (b), gave a particular account, which received different determinations, and there were great variety of opinions of the Judges, upon the appeal to the house of lords; but the decree was affirmed. There are other cases upon this question: *Daftord v. Goodman* (c), *Webb v. Webb* (d), and *Donn v. Merrifield* (e); but I cannot rely upon that last case as any authority. The limitation was much like the present, viz. "ITEM, All other my leasehold estates I devise to A. his executors, &c. to hold during the term for the following uses: To Catherine Donn for life; then to his (the testator's) brother John for life; then to such person as John should marry; and after her death (the wife of John), to the heirs of the body of my brother John, their executors and administrators, with remainder over;" and an issue was directed to try the validity of the deed, and not the construction of the will; for upon that deed it was that the title and power of the testator to devise depended. It is probable, that as to the account given by the Counsel of the sentiments of the Court, it was right; for if the Court had thought the limitations over had been bad, an issue would not have been directed, because that would have been vain; and it is probable the Court might be inclined that the limitation over was good; but that is too slight for me to lay any weight upon.

These cases of trusts of terms for years are all grounded upon the apparent intention of the party, and construction of the words favouring that intention.

The objection to this is by defendant, that these cases arise either upon marriage-settlements or wills; and that in the case of wills, they are always to be construed according to intention, but deeds receive a strict construction; but as to this construction, the case of *Lisle v. Grey* is an answer clearly; for that proves, that even in the case of an inheritance, and on a deed, if the intention appear to make the words "heirs of the body" to be words of purchase, and to constrain the Court to make that construction, then they ought to do it. As to the distinction between this case and those that arise upon marriage-provisions, there is more weight in that; but there all the cases cited before depended upon the intention of the party appearing upon the deed; and if that was not the rule for the Court to ground themselves, the foundation would fail.

In deeds as well as wills, where it appears that the word heirs should be understood as a word of purchase, his Court will decree it so.

(a) 2. Vern. 43. 195. 2. Freem. 314. 1. Eq. Abr. 362.
(b) 2. Eq. Abr. 305.
(c) 2. Vern. 362. Prec. Chan. 96. 2. Freem. 228.

(d) 1. Peer. Wms. 32.
(e) 3. Viner. Abr. 222.

In the cases of voluntary settlements and terms for years, in trust, if the intention appear, it ought to prevail; and there is no difference between that and marriage-settlements; but in the latter, the Court will sometimes make a more favourable and stronger construction to comply with the intention of the party, and to create a ground of contract, than they will in cases of voluntary settlements.

HODSELL
against
BUSELL.

The question is, Whether the intention of the party, here expressed by the words of this deed, requires this construction, that the words "heirs of the body, &c." should be construed words of purchase? And I think clearly it does, and that more strongly than any one case upon terms for years that has been cited; and I think the words used here, declaring the trust for the benefit of the wife, are of the same import as if it had been given to her "for her life only;" for the words are in the first place "to permit the defendant Grace Bussell to receive the rents and profits for and during the said term, for and towards the better support and maintenance, if she should so long live." It was admitted in the argument, if the words had been "for her life only," that would have turned the words "heirs of her body" into words of purchase; and this has been so adjudged in the case of a freehold estate. In *1. Vent. 231.* a case was cited there, where the words were, "to J. S. *et non aliter*, and to the heirs or issue of the body;" and they were held words of purchase. In the case of *Backhouse v. Wells (a)*, the first limitation there being for life only turned the subsequent words into words of purchase, and could not be construed to enure by way of enlargement of the words to the first taker, in contradiction to the word "only." Here the words "if she shall so long live" make it contingent, on condition that if she live out the whole term she shall have it, but if she do not she shall not: so that these words are in the affirmative, and imply a negative.

A trust declaring the benefit of a term to *cestui que trust*, if she should so long live, is of the same import as if it had been given to her for her life only.

A gift to A. for life only, *et non aliter*, and to the heirs, or issue, of his body; here heirs or issue are words of purchase; for a construction shall not be admitted to enlarge an estate contrary to the word only.

The words that make this stronger than *Dastord v. Goodman (b)* or *Peacock v. Spooner (c)* are the words "to the heirs of her body, their executors, administrators, and assigns;" which amount to a declaration, that the executors and administrators of the heirs of the body should take this term, and not her executors and administrators, and amount to a declaration of the intention to vest the whole property of the term in the manner as the words are used, viz. "in the heirs of the body, their executors, and administrators," and not in *Grace Bussell* herself. And the addition of the words "their executors and administrators" proves, that it was not the party's intention that this term should go to all the heirs of the body in succession, so as to include all the heirs of the body for ever; but that it should vest in some particular person.

Dastord v.
Goodman.
Peacock v.
Spooner.

(a) Post. 1. Eq. Abr. 184. (b) 2. Vern. 362. Prec. Chan. 96.
2. Ld. Ray. 1439. 2. Stra. 731. (c) 1. Eq. Abr. 362. 2. Freem. 114.
1. Mod. 261. 10. Mod. 186. Fort. 2. Vern. 43. 195.
40. Gilb. 20.

The words *heirs of the body* make a tail in freehold, or vest the whole property in terms, from a presumption of law, that it includes all heirs for ever. But where a limitation of a term is to the heirs of the body, and the executors and administrators of such heirs, the presumption is taken away.

The reason why the words "heirs of the body" make a tail in freehold, or vest the whole property in the term, is from the presumption of law, that it includes all the heirs for ever; but here it is to go "to the heirs of the body, their executors and administrators." THEREFORE I THINK, the whole trust of this term is not vested in *Grace Buffell*, and that the words "heirs of her body" are not words of limitation but of purchase, and descriptive of the person to take after her death.

The objection is, that supposing "heirs of the body" to be words of purchase, yet the whole interest of the term would vest in such heirs of the body, in case there were such, and consequently that the limitation over would be still too remote; for it is said, where a limitation over in contingency is "to the heirs of the body," or "to a first son, and the heirs of his body," though that contingency never happens, and there is never a son born, yet that the limitation is too remote, and that let that event fall out how it will, it will not alter the law.

I shall not consider the cases of *Stanley v. Leigh* (a), *Clare v. Clare* (b), *Saberton v. Saberton* (c), *Gore v. Gore* (d), and *Gower v. Grosvenor* (e), whether a limitation over after a tail in contingency is good, where the contingency never happened or vested, because, upon the penning of this limitation over, there is no occasion for it; for if the words "heirs of the body of *Grace Buffell*, &c." are words of purchase, then this is no limitation in tail; for it is the same as if a limitation had been "to her eldest son by *Edward Buffell* her husband; or in case of no son, then to the daughters, their executors and administrators."

The whole trust of the term is by these words expressly limited either in the sons or daughters that should be heirs of the body; for the words "their executors and administrators" shew, that the intention was to vest the whole trust of the term in some particular person, and not that the trust of the term should go in succession to the heirs of the body. If it is to vest in a particular person, then at the time of such vesting it is impossible it should go on, according to the expression "from heir of the body to heir of the body, and to the executors, &c. to each heir of the body;" therefore when there is a limitation "to the heirs of the body, their executors, &c." it must vest in the first taker as much as if it had been a limitation "to a first son, his executors and administrators; or in case of no son, then to the daughters, their executors and administrators." And if this be the construction of these words, "heirs of the body, their executors and administrators," consider then the effect of the subsequent words of the limitation over, viz. "and for want of such issue, then in trust for *Henrietta Hodges*, &c." If the former words "heirs of the body," and the words "for want of such issue," will be the same as if it had been said,

(a) 2. Peer. Wms. 686.

(b) Cases Temp. Talb. 27.

(c) Cases Temp. Talb. 55. 245.

(d) Ante, 4. 30. Mod. 501. 2. Peer. Wms. 28. 2. Sira. 958.

(e) Ear. Ch. Rep. 54. Post. 249.

"for want of sons or daughters of *Grace Buffell*, by *Edward* her husband to be begotten" (for the words "such issue" in the limitation over must receive the same construction as the words "heirs of the body;" "as" used before for the word "such" confines the words to the same as the heirs of the body is); this is not too remote, for it must be known at the time of the death of the husband, or nine months after, whether there will be any issue: and that brings it to the case of *Gore v. Gore*; and it is common with a case of a limitation of the trust of a term to limit it to the first son, if there be one; and if there be not, then to the daughters; and if no daughters, to the executors or administrators of the father. Perhaps it may be objected, that this does not differ from the case of a limitation to a first son and the heirs of his body, which was the case of *Stanley v. Leigh* (a), *Higgins v. Dowler* (b), *Clare v. Clare* (c), and *Saberton v. Saberton* (d): but that objection will not hold, for the construction differs from all those cases; and in that case above the whole trust of the term was contended to vest in the first son by construction of law only to avoid a perpetuity, because it was said, that there was an intent to create an entail of a chattel; but there is no such intent, if the construction I have put is right; for when the limitation is "to the heirs of the body," "their executors and administrators," this must be the construction, viz. to the first son, and if no son, then to the daughters, their executors and administrators. In the cases put of the words "issue" or "heirs of the body," they are *nomina collectiva*; and the words "for want of such issue" mean issue *in infinitum*. In the present case, it must mean heirs of the body born within a reasonable time after the death of the husband. Here it is "heirs of the body" by express words; in the other case, it is only by construction of law.

HODSELL
against
BUFFELL.

Therefore I think; the construction that arises from the words, and the difference that arises in this from all the other cases, makes it a plain case; and if so, the plaintiff must have these deeds and writings.

DECREE, That the plaintiff *Henrietta Hodsell* and *Edward* her son are entitled to the reversion of ninety-nine years term after the decease of the defendant *Grace Buffell*, according to the deed of the twentieth of *January* 1721; and I therefore decree; that the defendant do bring it before, and leave it with, THE MASTER.

(a) 2. Peet. Wms. 686.

(c) Cases T. T. 21.

(b) 1. Salk. 156. 1. Peet. Wms.

(d) Cases T. T. 55. 245.

Case 90.

Newstead against Johnson (a).

Tuesday, 15th July 1740.

A. by will directs 3000l. out of his stock in trade to be laid out in lands to be settled to the use of his first son in tail, and gave the residue of his joint stock and partnership in trade to B. his executors, administrators, and assigns; and willed that he should become partner with C. but declared the gift to B. to be in trust for his daughter the wife of C. and to be at her separate disposal, notwithstanding her coverture, and made his said daughter sole executrix; and there being no disposition of the residue; it was DECREED, the daughter should take the residue, notwithstanding the bequest to her use; for that by this bequest in trust the testator only intended his daughter a provision independent of her husband, who he designed should take the residue with his wife.

S. C. 2. Atk. 45.
S. C. Bar. C. R.
94.

THE TESTATOR, *William Lawson*, directed three thousand pounds out of his stock in trade to be laid out in lands to be settled to the use of his first son in tail male, with remainders over; and as to all the rest and residue of the joint stock and partnership in trade, &c. he gave it to *John Senior*, his executors, administrators, and assigns; and his will and desire was, that *Allen Johnson*, his son-in-law, and he, agree to be partners, and enter into articles as Counsel should advise; and as to his said devise to *John Senior*, he declared the same to be in trust only for his daughter, *Elizabeth Johnson*, for her sole and separate use during her life, and for such other uses and purposes as she should appoint by any deed or writing in her life-time, or by her last will, notwithstanding her coverture; and his will was, that the said *Allen Johnson*, his daughter's husband, should have nothing to do with the same, or any part thereof, or receive any part thereof, otherwise than as joint partner. Then the testator, after giving several directions about partnership, makes his daughter *Elizabeth Johnson* sole executrix.

The testator afterwards died; and his debts and legacies being paid, there remained a large surplus, for an account of which the bill was brought, and that the executrix might be a trustee of the same for the next of kin to the testator.

MR. BROWN, for the plaintiff, insisted, that it was a general rule, that the giving an executor a legacy prevented his taking the residue, and made him a trustee for the next of the testator's kin; that a devise in trust of a separate stock in the partnership, so that the executrix's husband should not intermeddle, was not any exception to that rule. Suppose a testator gives a legacy to A. in trust for B. and makes B. his executor, that legacy shall prevent his taking the residue, notwithstanding its being devised in trust, for that makes no difference.

To which THE LORD CHANCELLOR agreed.

MR. NOEL and MR. MURRAY, for the defendants, answered, that although the distinction between a legacy given to an executor who was a relation to the testator and an executor who was a stranger, had been often over-ruled in the later cases; yet that where a legacy was given to the executor, not expressly, but by being excepted out of a devise to another person; or where the legacy given to the executor answered any particular purpose, and was not inconsistent with his taking the residue; there it could not be presumed that the testator meant to exclude him from it: *Stabitur præsumptioni donec probetur in contrarium*. They cited the case of *Fogier*

(a) NOTE, This case was taken from the manuscript of Mr. PICKERING. MSS.

v. Munt,

v. Munt (a); the first case in point of time; the case of *Griffiths v. Rogers* (b) was next; the next case was in 1709, of *the Duchesse of Beaufort*, in the house of lords (c), where the decree for a distribution was reversed; and the surplus of the personal estate adjudged to the executrix. The next in time was *Westcomb v. Jones* (d), being about two years afterwards, and was determined upon the same reasoning and distinctions; and *Ball v. Smith* (e), which is allowed in *Prec. in Chan.* 566. upon another ground.

NEWSTEAD
against
JOHNSON.

HARDWICKÉ, *Lord Chancellor*. The cases in regard to excluding executors from taking the surplus of the personal estate, by reason of the particular legacies before given to them, have been very various, and undergone different determinations, according to the different circumstances and opinions and way of reasoning of different persons concerning them; and it is absolutely impossible to reduce all those cases to any certain or general rule, without some contrariety between them. But I think the present case a very plain one, that the executrix here should not be excluded from the surplus.

The law is clear, that where a man makes his will, and an executor, it is a gift in law of all his personal estate to him; so is the rule of the ecclesiastical court. Therefore it is, that where a suit is brought in such case for a distribution of the *residuum* undisposed of by the will, this Court will prohibit them from proceeding in such suit, because they are bound to give the surplus to the executor; and this Court interposes upon a supposed trust in the executor, of which that court has no cognizance. And I remember some cases, one at the latter end of *Queen Anne's* time, and another since, and a third when I sat as Chief Justice at the King's Bench, where such prohibitions have gone; so that the ground upon which executors have been in any cases compelled to distribute the surplus, has been certain circumstances in equity which have induced a violent presumption that amounts to evidence that the executor was intended only a trustee.

The first case was that of *Foster v. Munt*, where it was first sent to the master to enquire, what the surplus amounted to; and I have heard, that that arose in a great measure from an ill opinion which my LORD JEFFRIES had conceived of the executors behaviour in obtaining the will; and it being reported to amount to five thousand pounds, he thought it was absurd to say, that the testator would have given the executor so small a legacy as ten pounds for his care and pains, if he had meant at the same time to give him the surplus; but there was no particular evidence of any fraud in that case, but only such a general charge in the bill; so that the decree was founded wholly on that single point (f).

(a) 1. Vern. 473. S. C. 1. Eq. Ab. 243.

(d) 1. Eq. Abr. 245.

(b) *Prec. Ch.* 231. S. C. 1. Eq. Ab. 245.

(e) 2. Vern. 675.

(c) 2. Vern. 648. S. C. 1. Peer.

(f) See *Prec. in Chan.* 567.

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against
JOHNSON.

From that time it was taken, that where a legacy was given to an executor for his "care and trouble," without any disposition of the surplus, he should be considered as a trustee; and that was founded upon good reason, for such a legacy "for care and pains" was a plain declaration of the testator's intention, that as to the rest, the executor should not take it to his own use; for it would be ridiculous to suppose, that the testator should give him a small legacy for his trouble in managing an estate for himself (a).

Chan. Preced.
169, 170.

Afterwards the Court went further on the like kind of reasoning, and held, that where a particular legacy was given to the executor generally, without saying "for care and pains," even this would exclude him from the surplus, because of the absurdity, as no doubt there would be, in giving him some and giving him all; from whence the Court raised an implication, that since the testator had given him a part, he never intended him the whole: and this point is now established, though it was at first objected, that the particular legacy might be owing to a doubt of the testator that the whole personal estate might not prove more than sufficient to pay all the legacies, in which case the executor would not take a shilling; for which reason, the testator might be unwilling to leave him to the chance of the surplus, but would secure something to him by a particular legacy, and then, in case of a deficiency, he would abate only in proportion. However, this point has been now long established, and is not to be controverted by such an argument. And I remember in the case of *Farrington v. Keetly* (that is the true name of the case, and not *Farrington v. Knightly* (b)), LORD MACCLESFIELD said, that he had consulted with *Mr. Vernon*, who had then left the Bar, who told him, that he did not trouble himself with taking notes of modern resolutions upon this point, because he looked upon it to be as plain and settled as that an estate to a man in fee should descend to a man and his heirs. Other cases have been determined in favour of the next of kin, upon the circumstances of proximity of blood; but these distinctions have been over-ruled in latter cases; particularly in the case of *Lady Granville v. the Duchess of Beaufort* (c), because that reasoning might produce great uncertainty. For if that distinction was to be admitted, then a distinction would arise as to those of the nearest degree of kindred and those who are more remote; and if the testator's intent was to depend on such circumstances, it would bear a very uncertain construction. However, in the case of *Ball v. Smith* (d), LORD HARCOURT did allow of this reasoning in the case of a wife, it being after the reversal in the house of lords of the decree in the *Duchess of Beaufort's Case*, upon which he founded his opinion. In that case, one of my LORD HARCOURT's reasons was, that the particular legacy given by the husband to the wife was only of what was her own before, and which she had as

(a) See *Davers v. Dewers*, 3. Peer. Wms. 43. *Joslin v. Brewitt*, Bunb. 112. *Southcote v. Watson*, 3. Atk. 228. *Andrews v. Clark*, 2. Vezey, 162.

(b) Prec. in Ch. 566.

(c) 1. Peer. Wms. 115. S. C.

2. Vern. 648

(d) 2. Vern. 675.

executrix from her first husband. But that reason would hardly support the determination, because whatever she had before the marriage became the absolute property of the husband by the marriage, and consequently was as much a gift from the husband to the wife by his will as if it had been of any other part of his estate. However, I suppose the Court might make use of that point in order to difference it from the *Case of the Duchess of Beaufort*, where THE CHANCELLOR disallowed the argument of proximity of blood: so that these distinctions, and the notion of proximity of blood and *hæres ab intestato* as to a *residuum* undisposed of, have not prevailed (*a*). I mention these things to lay them out of the case; for the ground of my determination is, that this legacy is given to a wife of stock in trade, in trust for her separate use, and under very particular circumstances. Upon the nature of this legacy, I AM OF OPINION, that it comes expressly within the reasoning of the cases of *Griffyth v. Rogers* (*b*), and of *Lady Granville v. Duchess of Beaufort*, both of which were determined before that distinction made by LORD HARCOURT, in *Ball v. Smith* (*c*), was introduced. In the first of those cases, the testator made his wife executrix, and gave to another all his books, except ten such as his wife should chuse, as plays, romances, sermons, but not law-books; and the question was, Whether this was such a legacy as would exclude her from the surplus of the other personal estate? And the Court held, that it would not, it being no devise to her, but only an exception out of a gift to another; and upon this the case of *Lady Granville v. Duchess of Beaufort* was founded. There the Duke of Beaufort devised the use of his table-plate to the Duchess for life, and after her death to the Marquis his grandson, and made the Duchess executrix; and THE LORD CHANCELLOR held, that she was only a trustee for the surplus; but it appears by MR. VERNON'S report, that my LORD COWPER himself was apprehensive that this decree would not be final; and he admits, that the argument of the devise operating only in nature of an exception was the strongest exception, though on the strength of the former authorities he decreed against the Duchess; but upon appeal, that decree was reversed in the house of lords the twelfth of December 1715, and the surplus given to the Duchess. It is very difficult to come at the particular reasons upon which the determinations by the house of lords are founded, because they are an assembly wherein a great many declare no reason for their opinion; but I have looked into the printed case, and in the appellant's case I find this distinction very strongly relied on, that the gift of the plate to the Duchess for life did not carry such an implication, that the testator meant thereby to exclude her from the residue, for the legacy is only by way of exception; and if he had meant otherwise, he would have given her the plate absolutely, and not barely the use of it, and after her death to his grandson. And this

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against
JOHNSON.

Proximity of blood no argument to entitle an executor to a residuum not disposed of, where he has an express legacy that by implication would otherwise exclude him from such residue.

A legacy to an executor in nature of an exception will not preclude him from the residue.

(a) See *Randal v. Bookey*, 2. Vern. 425. *Martin v. Rebowe*, 1. Brown's C. C. 154.

(b) *Prec. in Chan.* 231. S. C. 1. Eq. Abr. 245.

(c) 2. Vern. 675.

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against
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case is there put : Suppose *the Duke* had devised the plate to *the Marquis* after his wife's death, she would have had the use of it in the mean time, and yet it cannot have excluded her from the residue ; and it was said, there was the same reason why it should not in that case. The printed case, indeed, contains other reasons, which are mentioned in *Mr. Peere Williams* and *Vernon's Reports*, on the parol evidence and hearsay of the drawer of the will, who was dead ; but they were not regarded. Besides this printed case, I have heard some lords, who joined in giving that judgment, mention this as the reason ; and I have heard it mentioned likewise as a reason in this court ; and I think it a very solid one.

Then THE QUESTION will be, Whether this trust-legacy comes within the reason of the two former cases ? And I AM OF OPINION it does, because the general reason of *the Duchess of Beaufort's Case* was, that the gift of the plate to her for life was consistent with the testator's intention to give the surplus to her, by virtue of his making her executrix. Here the intent of the testator is manifest ; he gives the particular legacy in trust for the wife, who was his daughter, because otherwise it would have passed to the husband as his absolute property ; for though upon her death it would have passed from her to the administrator *de bonis non*, yet the husband would have it in point of property and interest, as he would be entitled to it after the debts and legacies were paid out of the assets ; which reason does not extend to the *residuum*, for that it does not ; but he intended, the husband should have that as well as his daughter, and no implication can arise upon a will but by a necessary construction. If so, the testator had no occasion to make an express devise of that in trust, as he did of the other.

It was said, that a particular legacy given in trust for an executor will have the same effect in point of law, and bar him of the *residuum*, as much as if the legal interest of the legacy were given him ; and that is certainly true, because it implies nothing which makes any difference between such a devise in trust and an absolute one ; but, as I said before, here was a particular reason why this legacy was expressly given in trust, for the husband could not have been otherwise excluded ; and it is, that the trustee may enter into partnership with the son, and he is to improve the stock for the separate use and benefit of the wife, which prevents the common implication, that the *residuum* should not pass. And this distinguishes it from the case of *Willis v. Brady* (a), last Term, before THE MASTER OF THE ROLLS at *Westminster* : There the testator gave the surplus of his personal estate to his daughter for life, whom he made executrix, and gave one moiety over to another person ; the question was, Whether this gift of the surplus for life to the daughter, with a moiety over, was sufficient to exclude her from taking the surplus as executrix ? And THE MASTER OF THE ROLLS held, it was sufficient to bar her ; though it was urged by the Counsel, that the legacy, being under

(a) See the case at large, Bar. Ch. Rep. 64, 65.

a restriction,

a restriction, might be extended to exclude the gift of the moiety to the stranger. I do not know upon what grounds THE MASTER OF THE ROLLS made his decree; but I should have founded my opinion in that case upon its being a particular interest given to her for life, which implies a negative of any other interest greater than for her life. But here is no such circumstance in the present case, there being no express devise of the *residuum*, even for life, to the daughter.

THEREFORE I THINK, there is no ground to make the executrix account for the surplus; and as to that the bill must be dismissed.

NEWSTEAD
against
JOHNSON.

Quare. Vide
ante, Lady
Granville v.
Duchess of
Beaufort; for
that is a gift for
life, and yet not
excluded from
the residue.

Sterling against Penlington.

Case 91.

Lincoln's-Inn-Hall, 25th February 1739.

A. UPON the death of her husband entered, and was seised in fee as tenant in common of one fourth part of an estate; and was likewise tenant in dower of one other fourth part, being a third part of the remaining three-fourths; and as to the other moiety of the whole estate, she was seised as guardian in socage to her son. The son went abroad, and died under age; upon which his sister became intitled; and then the mother was guardian in socage to her. The daughter married and died under age. But before her death a bill was brought by the husband and wife for an account of the rents and profits; which the mother refused to give, or let the daughter occupy, imagining the son to be then alive. By the decree, an account was directed, with a reservation of liberty to apply for further directions. The plaintiff and his wife likewise brought an ejectment against the mother, and recovered; and upon the reservation

A. on her husband's death entered, and was seised in fee of one-fourth of an estate; was tenant in dower of another fourth; and guardian in socage to her son of the remaining moiety. The son died abroad, by which B. his sister became intitled; B. marries, and she and her husband bring a bill for an account and an ejectment at law. An account was decreed; after which B. dies: and the question was, If B. had such a seisin as to give her husband a right of tenant by the curtesy? And decreed that she had, for that the seisin of the mother as guardian was a seisin of the daughter; though

THE

THE QUESTION was, Whether, the mother receiving the profits and continuing in possession as guardian in socage, there was such a seisin of the daughter of this estate during the coverture as would entitle the husband to be tenant by the curtesy?

FOR THE PLAINTIFF were cited, *Cro. Jac.* 475. *Salk.* 285. 2. *Co.* 190. *Moor.* 59. 4. *Co.* 373, 374. *Carter.* 176. and *Plowd.* 536.

HARDWICKE, Lord Chancellor. I had at first a doubt, whether the husband could be a tenant by the curtesy or not; but now I think he is so, both in law and in equity. As to the point, whether an ejectment, and a confession of lease, entry, and ouster, is a sufficient entry to make seisin in deed, and so the husband tenant by the curtesy after the wife's death, it is not necessary to be determined at present; but if it were, I should think it is not a sufficient entry to make him tenant by the curtesy. There have been many resolutions

LORD CHANCELLOR said, that an ejectment without confession of lease, entry, and ouster, would not make a seisin sufficient to give the husband such a title.—S. C. 2, Eq. Abr. 730. S. C. 7. Viner, 149. S. C. 14. Viner, 512.

R 4.

with

STERLING ^{against} with regard to the force and effect of an entry by ejectment; and
PENNINGTON. at a meeting of all the Judges, in HOLT's time, in the third year of Queen Anne, it was determined, that a confession of lease, entry, and ouster, or delivering an ejectment, will be a sufficient entry for non-payment of rent. But they said, they should not have gone

An ejectment so far, had it not been for the former resolutions to that effect. But they held, it would not be a good actual entry to avoid a fine, or the statute of Limitations, unless upon a proceeding in the same action on that ejectment; but in another action after the twenty years it would not. This is a strong determination, that delivering actual entry as an ejectment, or the rule for confession of lease, entry, and ouster, will be sufficient is not sufficient to make an actual entry (a), and therefore that to avoid a fine, it would not make such a seisin in deed as will make the husband or the statute of Limitations. *tenant by the curtesy*; but he ought to have made an actual entry after the death of his wife (b).

But upon other reasons I am of opinion, that the husband in this case ought to be *tenant by the curtesy*.

UPON THE FIRST POINT, that the entry of the mother as *tenant in common* of one fourth part would be a sufficient entry of the daughter during the coverture to make her husband *tenant by the curtesy*; it is true, as said by Hob. 120. that a *tenant in common* may enter three different ways: by claiming and receiving the profits for himself and companion, which is the most clear; or by claiming the whole for himself only, but that is not an actual entry for the other, but to his exclusion; or he may enter generally, and that shall be adjudged for himself and companion, because all general entries must be construed according to the right of the case. The father died; the mother entered, and was seised of one fourth part as *tenant in common*, of another fourth as *tenant in dower*, and as to the other moiety as *guardian in socage* to her son; and that was the seisin of the son; and so she continued during the son's life. It is said, notwithstanding, that she holding over after the death of the son is an exclusion of the daughter, because she refused to let her enter, or to account for the profits; but that was not claiming for herself, but insisting her son was living; which was a mistake in fact, he being then dead. At common law, an action of account would not lie by one *tenant in common* against his companion, unless he had made him his bailiff; and so is LORD COKE: and that was the occasion of 3. & 4. Anne, c. 18. by which the law is altered, and an action given generally to one tenant in common against the other; and therefore one tenant in common cannot enter in such manner as to exclude his companion, but by express words, because then the action of account will lie against him by that act, and then this must be a seisin of both; for an action of account will not lie by one tenant in common against another, unless he has been in possession, for since this act of parliament there must be an actual ouster: but the mother

(a) See Berrington v. Parkhurst, Stra. 1897. Goodright v. Cator, Dougl. 486, 1085. S. C. Andr. 125. S. C. 4. Bro. Jenkins v. Pritchard, 2. Will. 45. P. C. 353. Oates v. Brydon, 3. Burr. (b) See Fitchet v. Adams, 2. Stra. 1128.

admits herself to be tenant in common with somebody ; therefore it is rested only upon this, that the possession of the mother was a sufficient seisin of the daughter during the coverture. But it appearing the son died in 1727, and the daughter then an infant, and did not marry till four years after, that shews the mother was seised as tenant in common with her daughter as to a fourth part, and as to the other moiety she was seised as guardian to her daughter ; for the law will adjudge it, that she received the profits as guardian to her daughter, and that will be the seisin of the daughter ; for let her be in possession in any way whatsoever, the law will consider her as guardian to her daughter : if so, the daughter marries, and her declarations afterwards will signify nothing ; for if there be any seisin of the wife during the coverture, the disseisin afterwards will not vary the case, if she was ever actually seised ; for notwithstanding she is disseised afterwards, the husband will be *tenant by the curtesy*, because the seisin of the wife during the coverture is what gave him the title. Thus it is at law, and in this court it is stronger. The husband and wife bring a bill against the mother, and there is a decree to account for the profits accrued during the wife's life, with a reservation for further directions ; which proves that the wife was seised ; for if she had not been by law seised, they could be entitled to no account. And upon this reservation I am bound to proceed upon the same principles as that decree ; and if I am to adjudge the share of the profits of the land accrued, due in the life-time of the wife, to belong to the husband, it would be an absurdity if I did not likewise adjudge the same land itself to belong to the husband, and that he should be tenant by the curtesy after the wife's death ; for it would be contradicting the decree in terms.

STERLING
against
PENNINGTON.

THEREFORE I THINK, the husband is tenant by the curtesy,
&c.

Gower against Grosvenor and Piggot (a).

Case 92.

Trinity Term, 13. & 14. Geo. 2. In Chancery.

SIR THOMAS GROSVENOR gave by will to his niece, the plaintiff, several legacies, who brings this bill to have them secured ; and Sir Thomas not having left sufficient assets exclusively,

A. devises his real estate to B. his brother for life ; then to trustees to preserve contin-

gent remainders ; remainder for his first and other sons in tail, with power to make jointure ; and if his said brother had no son ; or if he had and such son died without issue male, then to C. and his first and other sons in like manner ; and willed, that his plate, jewels, &c. should go to the heirs male of the family successively, as his real estate is settled, as much as they could by law. B. died, having no son, and the limitation to C. held to be good by way of executory devise (b). — S. C. Bar. C. R. 54. S. C. 2. Eq. Abr. 327. 2. Vezey, 186. 3. Atk. 288. 3. Term Rep. 143.

(a) This case was taken from the manuscript of Mr. SHORT.

(b) See the case of Hodsell v. Bussell, ante, 236.

GOWER
against
GROSVENOR
AND PIGGOT.

THE QUESTION was, Whether certain jewels and plate, &c. which *Sir Thomas* was entitled to under the will of *Sir Richard Grosvenor* should be taken to be part of his personal estate?

HARDWICKE, *Lord Chancellor*. Limitations of personal estates whereby they are to descend in the same manner as real ones, are very common, and are with great reason allowed when they are not contrary to law; but dispositions of this nature, as well as others, must be subject to the rules of law, and if inconsistent with them cannot be valid. I shall consider the clause in the will of *Sir Richard Grosvenor* upon which this question arises in two lights: the one, as it relates to the precedent limitations of the real estate; the other, as a directory clause to the executors. *Sir Richard* having an intention to settle his real estate, and to limit part of his personal estate together with it, as far as the law would permit, makes his will, and devises his real estate to *Sir Thomas Grosvenor* his brother for life; remainder to *Robert Piggot* and his heirs, to support contingent remainders; and after his said brother's decease, for his first and other sons in tail, with liberty to make a jointure; "and if his said brother has no son, or if he has, and such son dies without issue male, then to *Sir Robert Grosvenor* and his first and other sons in the same manner, ITEM, his will was, that his plate, jewels, library of books, and furniture of his mansion-house, at, &c. and also of his dwelling-house at *Westminster*, should go to the heirs male of the family successively, as his real estate is settled, as much as they can by law."

This last clause must be considered as including every part of the limitation of the real estate, except that to trustees; and the same construction must be made as would have been if it had been in so many words, "My will is, that my plate, &c. shall go to *Sir Thomas* for life, and then to his first and other sons in tail male; remainder to *Sir Robert* for life, and then to his first and other sons in tail male."

It is urged, that although *Sir Thomas* never had a son, yet the limitation of the personal estate to *Sir Robert* is void, for the not happening of the contingency will not alter the case; and the remainder of a personal thing after such a limitation of it as would make an estate-tail in the case of a real estate, is void. Since *Manning's Case* (a) and *Lampet's Case* (b), the Courts have carried executory devises much further, and have held them good even after a contingent estate-tail that never vested. And I cannot but think there is a great difference in the reason of the thing between an executory devise after an estate-tail contingent and a vested estate-tail. In the latter case, no event that happens can make it good, as a devise to *A.* in tail, remainder over, for there is no contingency, but the limitation over is upon facts that are certain. In the former case, the limitation over depends upon the happening of the contingency;

(a) 8. Co. 94.

(b) 19. Co. 46.

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as where there is a devise to *A.* for life, remainder to *A.*'s first son in tail; in which case, before the statute of 10. & 11. *Will.* 3. c. 14. a posthumous son of *A.* could not have taken. So if a tenant in fee devise to *A.* and his heirs; and if he die without issue in the life of *B.* then to *B.* and his heirs; if *A.* dies without issue in the life of *B.* the remainder is good; if not, it is void. The happening or not happening of the contingencies in these cases makes the limitations good or bad; and great violence would be done to the intention of the testator if it should be otherwise. The words upon which the present question depends take in two contingencies: the one is, "if *Sir Thomas* has no son;" the other, "if *Sir Thomas* has a son, and such son dies without issue male." And the words taking in these two contingencies, the determination, as I have before said, must be the same as if they had been expressed, for what is necessarily implied is as expressed; and then the first limitation over will undoubtedly be good. So is the case of *Lodington v. Kime* (a), where there was a devise to *A.* for life; and in case he has any issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to *B.* and his heirs for ever; and this is but making the devise good by an event clearly within the intent of the testator.

The old cases go a great way in denying this doctrine; and it is true my LORD TALBOT thought otherwise in a case that came before him (b). The cases of *Backhouse v. Wells* (c) and *Burgefs v. Burgefs* (d) are the two oldest. The first was, A limitation of a term to a man for life; remainder to his first and other sons in tail; and for default of such issue, remainder over: the other was, A term limited in just the same manner; and the remainders were held void, though there was a default of issue. LORD NOTTINGHAM gives the same reasons for both these resolutions in different words: The first, he says, looks like a perpetuity, and the second has the prospect of a perpetuity; which I must say, as LORD VAUGHAN does in a particular case, I think is a very spongy reason, and such a one as I can by no means come into; for is it enough to set aside a disposition, that it looks like a perpetuity, though it is not really one? LORD NOTTINGHAM did not consider the double contingency necessarily employed; for in both cases, though the limitation over upon contingency would have been void, yet upon the other it was good. LORD COWPER, upon the demurrer in the case of *Higgins v. Dowler* (e), gave his opinion, that, the contingency not happening, the devise over was good; but this is not to be taken as a judicial determination. The case of *Vachel v. Vachel* (f) is very material in the present question. It was a

(a) Salk. 224.

(b) *Quære*, If this was not the case of *Clare v. Clare*, May 1734.

(c) 1. Eq. Abr. 184. 2. Ld. Ray. 1439. 2. Stra. 731. 8. Mod. 261. 10. Mod. 186. Fort. 450. Gilb. Rep. Ch. 20.

(d) 1. Mod. 114. Pollexf. 40.

Finch C. R. 91. 1. Chan. Cases, 229.

(e) Salk. 156. 2. Vern. 600. 1. Peer. Wms. 98.

(f) 1. Eq. Abr. 361. 2. Chan. Rep. 151. 1. Chan. Cases, 129.

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devise of the use of several paintings, books, &c. to testator's wife for life; and my will is, "that if she be with child of a son, "that then after her decease the same paintings, &c. shall be left "and come to the same son; but if my wife be not with child of "a son, or if the same son shall die without issue male of his body, "then my will is, that all my said paintings, &c. after the decease "of my said wife and death of such son as my wife is now with "child of, shall come and remain to the use of *Thomas Vachell*;" and upon advice with the Judges, and being assisted by two of them, THE LORD KEEPER, with THE JUDGES, were of opinion, that the devise to *Thomas Vachell* was good in law, the contingencies upon which it was made never happening. The not happening of the contingency is likewise given as the only reason for the determination in *Wood v. Saunders* (a) and *the Duke of Norfolk's Case* (b); which resolutions strongly support the extrajudicial opinion, if you will, of my LORD COWPER. I do not think the words, "and if neither of them leave issue, &c." were much relied on in the case of *Saberton v. Saberton* (c), though I cannot certainly say so; for the Judges, upon a reference to them, do not certify their reasons, and I have not had an opportunity to enquire into them. In the case of *Forth v. Chapman* (d), indeed, these words were much relied on; but there was no limitation to the heirs male. I have mentioned the general reason which weighs with me; but there is no occasion at present for me to determine this so litigated a point, for there are other words in this will that exempt me from that necessity, viz. "as much as by law they "can;" by which words the testator has cleared himself of all suspicion of having designed a perpetuity, the true construction of which is as far as by the common law of this kingdom and the rules of this court they can. Now he might have limited this personalty to *Sir Thomas* for life, then to his first son in tail, and if he has no such, remainder over, or until such son come of age, and then to him and his heirs, and if he die before he come of age remainder over, which the common course of conveyancing proves; and so are the cases of *Taylor v. Biddal* (e) and *Massenburgh v. Ash* (f).

Personalty limited to H. for life, then to his first son in tail; if he has none such remainder-over good.

2. Mod. 289.
1. Vern. 235.
S.C. Swyn. 187.

SECONDLY, This general clause in the will of *Sir Richard Grosvenor* is to be considered as directory; for here is no express gift, but a general declaration only. Indeed, if he had said, "my will is, that such a one shall have my pictures, &c." this had been an absolute devise; but these things vested in the executors; and I think, the legal property must be construed to be in them; so that *Sir Thomas Grosvenor* had only the use of them. Such clauses as these are often inserted in marriage-articles, and are common in wills where the testator had leasehold estates to dispose of. And I

(a) Pollexf. 35. 1. Chan. Cases, 131.
2. Chan. Rep. 239.

(b) 1. Eq. Abr. 192. 3. Chan. Cases,
1. Pollexf. 223.

(c) Annally Rep. 413. Cases T. T,
55. 245. 2. Eq. Abr. 349.

(d) 2. Eq. Abr. 292. 359. 1. Peet.
Wms. 663. Fitzg. 317.

(e) 2. Mod. 289.

(f) 1. Vern. 235.

think

think the most reasonable construction, and that which always ought to be put upon them; is that which I have made in the present case, viz. that they are directory and executory. In *Serjeant Maynard's Case* (a), trustees were inserted, though there were none in the will; but that defect is supplied here by the words "as far as by law they can."

Therefore I declare, that the plate, &c. limited by will of *Sir Richard* to *Sir Thomas* for life, then to his first and other sons in tail, remainder to *Sir Robert*, was not part of the personal estate of *Sir Thomas*, and that *Sir Robert* is intitled to the same.

(a) 2. Freem. 1.

Harvey against Harvey (a).

Case 93.

Chancery, Michaelmas Term, 13. Geo. 2. 1739.

HARDWICKE, Lord Chancellor. *Edward Harvey*, the father of the defendant, was seised of several lands for life under a marriage-settlement with his first wife; remainder to the defendant *Michael Harvey* in tail male. These two being thus seised, in 1715 conveyed those lands, upon the marriage of *Michael Harvey*, to the use of *Edward Harvey* for his life; as to part of his lands to his wife for her jointure, remainder to the first and other sons in tail male, remainder over. No recovery was suffered; so that the uses did not properly arise at common law. In this deed of settlement is reserved a power or proviso, by which it is agreed, that if *Elizabeth Harvey*, the present wife of *Edward*, should die in the life-time of *Edward*, and he should marry another wife, that *Edward* might settle so much of the lands on her as should amount to six hundred pounds a-year for her life, by way of jointure. That *Edward Harvey* is to be considered as a purchaser for a valuable consideration, because, being tenant for life of the whole, he parted with part of the estate to the son in consideration of that agreement; which is sufficient to make good the settlement. *Edward Harvey's* first wife died before him, and he afterwards married with the plaintiff *Mary Harvey*, then *Mary Carteret*, on whom a settlement was made in 1715, by which all the lands comprised in this power, which were valued at nine hundred pounds a-year, were conveyed to trustees, and to their heirs, during the life of the said *Mary Harvey*, then *Carteret*, upon trust to raise out of the rents and profits one hundred pounds a-year for *Mary* for pin-money as long as they both should live; and after the death of *Edward Harvey* to raise and pay her two hundred pounds a-year for her life as her jointure, and to permit the remainder-man to receive the residue. Afterwards *Edward Harvey* makes a further settlement of the said lands to the same trustees, and under the same trusts, to pay her three hundred pounds a-year more as an additional jointure. Some time afterwards, in

If a power, in which the intention of the parties is clear and evident, be executed defectively as to part, and afterwards executed defectively as to the whole of the interest, a court of equity will, in favour of a purchaser for a valuable consideration, reject the first appointment, and supply the defects of the second.

S. C. 1. Atk.
561.
S. C. Bar. C. R.
103.
S. C. 2. Eq. Ab.
669.

(a) This case was transcribed from the manuscript of MR. SHORT. MSS.

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1731, another deed of settlement was executed by *Edward Harvey* to the same trustees of the same lands, upon trust to raise and pay to the said *Mary Harvey* his wife six hundred pounds a-year for her life; which said six hundred pounds was to be paid in lieu and satisfaction of all former jointures and settlements, except the one hundred pounds pin-money, which was still to be paid her during their joint lives. Soon after this last settlement, *Edward Harvey* died, living *Mary* his wife, who brought her bill here against the trustees and the heir at law, *Michael Harvey*, to have this settlement put in execution, and the annuity of six hundred pounds a-year paid her.

Upon these settlements TWO QUESTIONS will arise:

FIRST, What is the construction of this power?

SECONDLY, The several acts that have been done by *Edward Harvey* towards the execution of it.

It is a power given to *Edward Harvey* to charge so much of those lands, by way of settlement on any after-taken wife, as would be sufficient to raise six hundred pounds a-year; but the estate was not to be exempt from taxes, &c. and to be conveyed only for the life of such wife; whereas here the whole lands are conveyed to trustees for ever, and a clear annuity of six hundred pounds settled on the wife.

Then as to the several acts of *Edward Harvey*, here is first a settlement for valuable considerations before marriage; another after marriage, which is voluntary; and a third, which drowns the other two; and as for the whole six hundred pounds a-year by way of annuity. Now upon this case thus stated, and upon considering the power, it appears, that the execution of it by the settlement made in 1725, precedent to the marriage of *Edward Harvey* with his second wife, is void both in law and equity.

In law, because the power given to *Edward Harvey* is to settle so much only of the lands as shall not exceed the yearly value of six hundred pounds, whereas he has settled the whole lands. By the power he was to settle it to her for her life, &c. whereas he has conveyed it to trustees for ever; which is also bad, the power not being pursued. Then he was only to settle so much of the lands as shall not exceed the yearly value of six hundred pounds, but not to be exempt from taxes and other incident charges, whereas he has charged them with a clear annuity of six hundred pounds; which is also void in law.

In equity it is also void, because neither party can have that which was stipulated for them; but not so void as that the wife shall have no provision made for her.

Edward Harvey could not charge the lands with any annuity at all, because the remainder-man was not intended to be affected with the charge; for he could not tell what profits the lands would produce.

produce. A settlement made to trustees and their heirs in trust to raise an annuity for the wife's life is not a complete jointure; for a jointure must be to the wife herself.

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I would consider upon this power what the wife is to have. The remainder-man was to have the estate over and above the jointure taken out of it, whereas the wife by the settlement has a clear annuity of three hundred pounds a-year, charged upon the whole of the estate. This is a very different interest than what he had stipulated for in the marriage-settlement of his father, considering the jointress could not stipulate to have this three hundred pounds a-year; for *Michael Harvey* was not obliged to submit either in law or equity. The utmost the Court would do would be to make the six hundred pounds a-year to stand as a security for the three hundred pounds a-year. So that it appears, neither of the parties can have what was stipulated for them.

It has been admitted, and very rightly for the defendant, that this Court does relieve against defective executions of powers, and aid them on behalf of purchasers, creditors, wives, and younger children (a), for wives and children in some degree are considered in equity as creditors by nature; but the wife in these cases must be otherwise unprovided for; and here, if *Mary Harvey* cannot have the benefit of the first settlement, according to the marriage agreement, then she is to be considered as a wife unprovided for, and will be entitled to the benefit of the latter settlement. I will suppose that no settlement at all had been made upon the plaintiff before her marriage, but after her marriage a voluntary one, and without any consideration, and *Edward Harvey* had made an execution of this power of the lands of six hundred pounds to his wife defectively, and she had come here after his death to have that aided; the Court would have done it to the whole extent of the land, otherwise she would be entirely unprovided for; and where that is the case, the Court never considers whether there is any sort of excess in the quantity at the time of the execution of the power; for if there is a power voluntarily executed for the wife, she shall have the benefit of it, unless there are suspected circumstances that equity can lay hold of; as any fraud, undue influence, or imposition on the husband, none of which appear, or are surmised, in the present case. There are many cases of this kind. In that of *Smith v. Ashton* (b), there was a provision merely voluntary, and a defective execution of the power; and they came here to have it supplied, and the Court did it. The case of *Tollet v. Tollet* (c), at THE ROLLS, 10th August 1728, was of the same sort, except

Equity will supply the defective execution of powers in favour of purchasers, creditors, wives, and younger children.

(a) See *Watts v. Bullas*, 1. Peer. Wms. 60. *Goodwyn v. Goodwyn*, 1. Vezey, 228. *Byas v. Byas*, 2. Vezey, 164. *Kettle v. Townsend*, 1. Salk. 187. *Hawkins v. Leigh*, 1. Atk. 387. *Cook v. Arnham*, 3. Peer. Wms. 283. *Smith v. Baker*, 1. Atk. 386. *Marston v. Gowan*, 3. Brown. C. C. 170. *Chapman v. Gibson*, 3. Brown. C. C. 170.

(b) 1. Chan. Cases, 264. Eq. Abr. 345.

(c) 2. Eq. Abr. 663. 1. Peer. Wms. 489.

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only that it was in the case of a will. There *George Tollet* the father gave the estate to trustees to the use of his son for life; remainder to trustees to support contingent remainders; remainder to first and other sons in tail; with remainder over; and he gave a power to his son, by any deed or writing under his hand and seal, to limit and appoint any part of the estate for a clear jointure to any wife he should marry: after the death of the father, the son survived, but was an infant, and he intermarried with the plaintiff, and then made his will signed and sealed by himself, reciting the power, and gave to the plaintiff, as a provision and jointure, the estate in question, in satisfaction of her dower; and then died, leaving the defendant an infant: the widow brought her bill to have the benefit of this provision: upon which there were two questions: Whether the execution of the power was good in law? and if not, Whether it ought not to be made good in equity against the remainder-man? THE MASTER OF THE ROLLS was of opinion, that it was not a good execution of the power at law, because it was to be executed by deed, whereas this was by will: and upon the second point, he thought it ought to be supplied, though this was by will, and merely voluntary: the cause stood over to have the will fully proved; and when it came on again, he was of this opinion: THE ATTORNEY-GENERAL, when he cited this case, said, that the MASTER OF THE ROLLS thought the word *deed* to be a peculiar one, and laid it down as a maxim in equity, that all defective executions of powers should be supplied in favour of a wife and younger children; and made a decree in favour of the wife (a). The case of *Carter v. Carter* (b), at THE ROLLS, June 20, 1730, was of a provision for younger children, where the power was defectively executed in law, without any consideration of marriage, and merely voluntary; and there was a decree to aid. The case was thus: T. Carter devised eight thousand pounds in trust to be laid out in land to be settled upon his nephew *George Carter* for life; remainder to his first and other sons in tail; remainder to trustees for fifteen years, without impeachment of waste, in trust to raise portions for daughters, to be paid at such time and manner as he should appoint in writing to be attested by two witnesses; and there were several other limitations over to *William Carter*, and his first and other sons; and power was also given to *George Carter* to make a jointure to his wife. In 1703, *William Carter*, the next remainder-man after failure of issue male of *George Carter*, brought his bill against *George Carter* to have the eight thousand pounds laid out. *George Carter* insisted upon the power he had of raising portions to the daughters by his own appointment, and making a jointure to a wife; and says by his answer, "I do appoint all the rents and profits of the lands to be purchased with the eight thousand pounds for fifteen years shall be collected and applied for raising portions for my daughter; but in case of more, then to be equally divided between them." And the decree

(a) See S. C. Forrester's Rep. 272.

(b) Cases Temp. Talb. 271. 2. Eq. Abr. 30.
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was made for laying out the money; but before a purchase was made *George Carter* died, without any other appointment of the power. *William Carter* brought his bill to have the benefit of the decree, for the eight thousand pounds to be laid out in lands, to have it himself, because it was limited over to him in tail. It was brought against the daughters and widow of *George Carter*, and they by their answer insisted upon the benefit of the power, and the widow insisted upon the articles made in consideration of marriage, and the agreement before; and by virtue of them, it was covenanted to settle the estate to be purchased to himself for life, remainder to her for life. The daughter insisted, that she was intitled to the term of fifteen years by virtue of the appointment by the father in his answer under this agreement; but if that was no appointment, then she insisted to have it by the will. The MASTER OF THE ROLLS decreed, that the articles were to be considered as a good execution of the power of appointment of the jointure. The agreement before marriage did not appear but by recital. The next question was, concerning the fifteen years term, Whether that was to be for the benefit of the daughter? And the first question was, that supposing there was no execution of the power, yet there should be one for the benefit of the daughter. And secondly, Whether what was mentioned in the answer was a good execution of the power. His Honour thought, that the answer was no execution of the power; that the fifteen years term should be considered as for the benefit of the daughter; and was of opinion, that it was not a good execution, but ought to be considered as a defective one in equity, and therefore proper for the Court to relieve; and decreed accordingly: and that as to the articles for the execution of the power, they were to be considered as articles in pursuance of an agreement before marriage in writing. Upon these authorities, and many others that might be cited, there can be no doubt but that a tenant for life with power to make a jointure, if he execute it after marriage, and without a valuable consideration, for a wife not otherwise provided for, that the defective execution of the power shall be aided in equity, and supplied. If so, the wife here must be entitled to her jointure contracted for before marriage, or to the provision made after marriage. I think, *Mrs. Mary Harvey* cannot have the provision made for her before marriage, because that is contrary to the power, both in point of circumstance and substance; for instead of allotting her six hundred pounds a-year subject to charges and reparations, that charge is of a clear annuity of three hundred pounds.

If I was to decree her something contrary to the contract upon the reservation of the power by the father and the son, or contrary to the stipulation of the wife, in neither of these cases should I be justified; and if I should decree the six hundred pounds a-year to be a charge upon the land out of which the six hundred pounds a-year is given, I should decree something different from the power, and from

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what is contracted for. If this execution of the power is void in law, she is a wife unprovided for; and then the question is, Whether she ought not to have the benefit of the settlement made for her upon her marriage? And I think she is clearly within the authority of both the cases I have cited, and within the rule laid down here for a wife unprovided for.

The present question differs from all the other cases cited, and I do not know of any under these circumstances. The plaintiff relies upon the supplying a defective execution of a power, where it was executed for a valuable consideration, but if voluntary, that it should not be aided: and this general rule here is laid down in several cases. The determination of *Bayley v. Montague* (a) was upon a different reason; for there the Court relied upon the case of *Sir John Hussy v. Lord Faulkner* (b), and that was a defective execution of a power by tenant for life for a mere voluntary consideration. The case of *Orby v. Lady Mobun* (c) was an uncertain execution of a power, and impossible to be reduced to certainty; there were no creditors, purchasers, younger children, or wife unprovided for; and it is not said, where a wife is in some degree provided for, that a defective execution of a power shall not be aided; but the cases import, that the present plaintiff cannot have the benefit of the first settlement, and if so the wife is unprovided for by any contract, and therefore within the rule of supplying defective executions for the benefit of wife and children by will. There have been many cases where defective executions of powers have been supplied, where the wife or children have had other provisions besides what was given them by such execution; as where there is a copyhold devised for the benefit of younger children who have had provisions by marriage-settlement, the Court will make good that defective devise where the heir at law has had a reasonable provision; so that it is no objection, that the wife is in part provided for. In the case of *Week v. Eams* (d), the plaintiff was a creditor of *Sir A.* son and heir of *Sir Charles*, and brought his bill to have a satisfaction out of the real and personal estate of the defendants. The daughters of *Sir Charles* insisted, as to some copyhold lands, that they were devised to *Sir A.* to his mother for life, and then to them; but that there had been no surrender. This being a provision for younger children, it was said the surrender should not be supplied, for the daughters had other provisions, in prejudice of creditors. But the Court was of opinion, that the defective surrender ought to be supplied; but decreed the mortgagee his mortgage. There have been other cases of this kind. There is one reason in the principal case that warrants me to do as I have done, and convinces me, that if I should decree in any other manner I should make such a one as would not be reasonable, and that is this, that if the wife had claimed the whole six hundred pounds a-year, without any

(a) 6. Bro. P. C. 232.

(b)

(c) 2. Vern. 531. Eq. Abr. 340

2. Freem. 291. Prec. Ch. 257. 3. Ch. Rep. 102.

(d)

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consideration or marriage provision, but solely by a defective execution of the power, it cannot be doubted but that the Court would have supplied it; and to say, because she claimed by a valuable consideration in part, that she should not be entitled, whereas if she claimed without any consideration the whole she would be entitled, this to me is strange, and hardly reasonable. Therefore I think, under these circumstances, the case is strong to supply the defective execution of this power. If there had appeared any kind of imposition or ill practice by the wife, or any advantage taken of her husband, that would have been proper for the consideration of the Court, and might have had great weight to prevent the aiding of the execution of the power; but there is nothing of that kind in the present case. *Michael Harvey* the son's estate is charged no further than what might be done; for by the marriage of *Edward* the father himself, there was the like power to him to make a jointure upon the marriage of his son; and it brings it within the original intent and agreement, that this six hundred pounds a-year ought to be admitted by him as a reasonable provision. *Lord Coventry's Case (a)* was much relied on as to the consideration of the articles before marriage being valuable. But I do not know the Court ever carried into execution these articles; for the difficulty here was, that there was no execution of the power, not because it was contracted for the settlement of the lands within the power, but the Court thought it was such a lien upon the lands as they could decree the execution of the power.

I would consider what is the operation of the declaratory clause in the last settlement; and I think this deed has introduced the incorrect execution of the power. It recites what had been before done, and declares, that this last deed was made to secure to the wife, after the decease of the husband, a jointure not exceeding six hundred pounds a-year, according to the power given to the husband. The parties were willing to waive all the proceedings before, and the intent was, that the wife should have this annuity.

And I am of opinion that she ought; and therefore do decree, that the plaintiff is entitled to the jointure of six hundred pounds a-year out of the estate, according to the power by the settlement; and that so much of the lands and premises comprised in the settlement of 1715 be allotted and set out accordingly.

This decree was afterwards affirmed, on a rehearing of the cause at *Lincoln's-Inn-Hall*, in the Vacation of *Trinity Term 1739*.

(a) Comy. Rep. 312. 1. Eq. Abr. 348. 9. Mod. 12. Gilb. Rep. 169. 29. Mod. 436.

Case 94.

Salt *against* Chambers (a).

Trinity Term, 13. & 14. Geo. 2.

If an estate is given to a father for the benefit of his children, to be paid them at twenty-one, and the father has no child, it shall remain in him for his own benefit absolutely.

S. C. 2. Eq. Ab. 539.

WILLIAM CHAMBERS being possessed of a considerable estate, after having given, by the first part of his will, a handsome fortune for every one of his children, and declared that he had an equal affection for them all, and that his intention was to make their fortunes as equal as possible, devised the residue of his estate, which was very considerable, in the following manner, *viz.*

“ As to the rest and residue of my personal estate, not hereby disposed of, after payment of my said legacies to my son *James Chambers*, and to my son *Thomas Chambers*, and to my daughters *Elizabeth Lawrance* and *Susannah Roberts*, as aforesaid, I give and bequeath the same, at the death of my said wife *Anne Chambers*, to my two sons and two daughters, to be equally divided among them: but my will is, that each of them pay such his respective share to and amongst his respective children in general, whether they be sons and daughters, &c. already born, or that shall hereafter be born, of my said sons and daughters, equally to be divided among them, share and share alike, as they shall respectively attain the age of twenty-one years, or be married, which shall first happen, and until such time the same to be in the best manner put out at interest, and the same and the whole interest thereof be paid to and divided amongst them, and no part thereof be applied to their maintenance or education, being a duty incumbent on their parents.”

James Chambers, one of the sons of *William Chambers*, the testator, died, having never had any children, and devised by his will the fourth part of this *residuum* to the plaintiff, who has brought his bill against the defendants for an account of *William Chambers's* personal estate, and to be paid the fourth part of it, which he claims under the will of *James Chambers*, the son, who had never any child.

The question is, Whether this fourth part of the *residuum* of *William Chambers's* estate is so vested in *James* as that he may, by his will, dispose of it upon dying without issue? or, Whether it is to sink into the estate of *William Chambers*, as an undisposed part of the same?

The defendants insist, that as by *William Chambers's* will the four children had all distinct fortunes given them before, and as it is expressly said in his will, that he had an equal affection for all his children, and was willing that their shares should be equal, as to this *residuum* the children only are to be considered as trustees for the grandchildren, and not to have the least interest in it themselves; and therefore as the testator *William* has not directed what shall be

(a) This case was transcribed from the manuscript of Mr. Short. MS.

done with the fourth part, in case any of his children should have no child, that as one of his children never had any child, it ought to be considered as a lapsed legacy, and result back to the testator's personal estate, and be divided amongst the testator's nearest relations, as if he had died intestate as to that part; and cite 1. Vern. 257. 23 Feb. 1729. *Mills v. Sharce*.

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against
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The plaintiffs contend, that by these words in the will the residue of the testator's estate became vested in the testator's four children, and they were to pay the same to their respective children, in case they had any; but if they had not, then the meaning of the will must be, that such of the testator's children as happened to have no child should retain his proportion of the residue of his father's estate, and that there are no words in the will that in any case divest the residue of the testator's personal estate out of the four children on their having no child; and there is no pretence for calling the share which *James Chambers* was intitled to, as one of the testator's four children, a lapsed legacy or trust; for it must be admitted, that the residue vested in the children on the testator's death; and if they were to be trustees, they were to be such only for their children, and for their own benefit in case they had none; and that as *James Chambers* never had any issue, he had a power by his will to dispose of the fourth part given to him: and suppose he had had issue, which afterwards died, it would not be contended but that fourth part would have belonged to him by taking out administration to his deceased children; and surely the fourth part of the residue of the personal estate was as much vested in the testator's children in case they had no issue, as in case of issue it became vested in the grandchildren: and therefore hope the plaintiffs, the trustees of the will of *James Chambers*, are entitled to one-fourth of the residue of the personal estate of the testator *William Chambers* for the uses mentioned in the will of *James Chambers*, and that this fourth part shall not be looked on as part of the testator *William's* personal estate undisposed of by his will. Cite 1. Chan. Cas. 198. *Martin v. Douch*.

HARDWICKE, Lord Chancellor. It is manifest, that the testator *William Chambers* has disposed of his whole estate. The defendants insist upon making this event that has happened, of *James* dying without issue, a different sense of the testator's, and that now as to *James's* fourth he must be considered as dying intestate. But I think, the testator's intention of an intestacy as to part cannot be supposed.

As to the first part of his will, it is plain he intended to make all his children equal. By that then, as to the residue, he seems likewise to intend the same thing, for he gives it to his four children as tenants in common: but then says, he intends it shall be for the benefit of his grandchildren that are born, or that shall be born; and that it shall be put out at interest, and kept entirely for their benefit. This clause creates the difficulty. *James*, one of his sons, never had a child, and devises his part of the residuum to the

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plaintiffs. The question is, Whether, having no child, he is entitled to the fourth part of the estate himself? or, Whether it must be distributed as a lapsed legacy? And that will depend upon this question, Whether *James* himself took any interest by the devise to him, or is to be considered only as a mere trustee for his children, if any?

And I am of opinion, that *James* is not to be considered as a bare trustee, but as a legatee of a fourth part of the *residuum* immediately vested, but to depend on, and be void on, a contingency which has never happened. The testator says, the share of the *residuum* shall be paid over to his grandchildren, born or to be born, at such an age. Such of his grandchildren as were then born had an interest vested in them immediately, and those afterwards to be born would have their interest vested as soon as born. As to those children of the testator who had no child at the time of the devise, it must be considered as an immediate gift to them, to be paid over to their children, if they had any; if not, for their own benefit. This seems to be the plain construction of the will, and agreeable to the declaration before made by the testator, that he intended to make all his children equal sharers of his estate.

The testator afterwards says, "whereas I have disposed of all my personal estate as equal as I can." This shews, that he disposed of the whole of his estate. He also considered the children of each child as a distinct stock, and not that all his grandchildren in general should have an equal share one with another, but that each son's and daughter's children should have a separate division, to be equally divided among them.

Let us consider now, where the interest of *James's* share is to go before any child is born. It could not be accumulated for the benefit of the grandchildren until there was a grandchild in being; and as long as no grandchild was born, nothing could be applied towards his maintenance, or be laid up for his benefit. In the mean time, it is to go absolutely to *James* himself, and cannot be applied for the benefit of a grandchild until one is born; for until then, nothing is to vest in him; it is given absolutely to the children. And this shews, that the testator intended only to defeat the interest of his children for the benefit of his grandchildren; but if no grandchildren were ever born, then that it was to remain for the benefit of the children.

Therefore I declare, that the plaintiff is entitled to the fourth part of *William Chambers's* residuary estate, and that the defendants do account for and pay him the same.

Robinson

Robinson against Cox.

Case 95.

Lincoln's-Inn-Hall, July 10, 1741.

THIS was a bill by an administratrix to discover the consideration of a note of one thousand pounds given by *J. Robinson*, her intestate, to *Mary*, the wife of the defendant *Cox*; and the bill also prayed to set the note aside, and to be relieved against it.

THE CASE was this: The defendant, *Mary Cox*, had been, for many years, a common whore upon the town, and was kept by *Mr. Robinson* the intestate for some years before her marriage. He allowed her a hundred pounds a-year, took her a house, and helped her to her husband *Mr. Cox*. After the marriage, he continued his visits as usual, and never failed seeing *Mrs. Cox* once a-week; or if business or sickness interposed, he always sent a letter.

Mr. Robinson often went out with *Mr. Cox* and his wife upon parties of pleasure about town, and had often signified his intentions of leaving *Mrs. Cox* one thousand pounds at his death; and at *Henly-upon-Thames* *Mr. Robinson* entered into this note of one thousand pounds payable to *Mrs. Cox* on demand for value received. *Mr. Robinson* several days after this admitted he had entered into such note, and shewed no dislike to it (a).

HARDWICKE, Lord Chancellor. The doubt I had upon the beginning of this case was the defect of proof of the criminal conversation between *Mr. Robinson* and the defendant *Mary Cox*; but upon hearing the depositions of *Mrs. Fuller*, who is mother to *Mary Cox*, I was fully satisfied of it; for as it stood upon the other evidence, there did not appear to be sufficient presumptive evidence of it, and in cases of this nature there must be proof enough to induce one to presume a criminal conversation; for suspicion of such a thing, how far soever it might ground my belief, it could not influence my judgment.

I shall now consider the several points upon which the plaintiff has put her case in order for relief in this cause. THE FIRST is, that this note is a forged one, and not really given by *Mr. Robinson*. THE SECOND, that if it is a true note, yet that it was obtained by fraud and imposition. THE THIRD, that if the note was really given by *Mr. Robinson* without any actual fraud or imposition, yet, from the consideration on which it was given, the Court will relieve against it.

As to THE FIRST POINT, Whether the note was really given? that is proper for a trial at law, and was tried collaterally in an action upon a bond brought by *Mr. Robinson's* administratrix against the defendant *Mary Cox's* husband, who pleaded this note

A. (for many years a common whore) was kept by *B.* for some time, and then married *C.* *B.* continued his visits to her, and gave her a note for 1000l. payable on demand. *B.* died, and now, upon a bill brought by his administratrix, this note was set aside, it being entered into *ex turpi causa*, and not as *premium judicis*.

(a) 1. Vern. 483. 2. Vern. 187. 242. 2. Peet. Wms. 433.

ROBINSON
against
Cox.

by way of set-off against the demand set up by *Mr. Robinson's* administrator ; upon which set-off this note was, and necessarily must be, proved to be a true one. But if the plaintiff had insisted upon a farther trial of the note being a real one, the Court would not refuse her that justice ; for it is proved to be given under very odd circumstances. When there was a party of pleasure to *Henly*, the husband went out of the room ; the wife went down for the pen and ink ; the note was written by her from the intestate's dictating, and signed by him only ; the words "*per me*" were written also by *Mrs. Cox*, which words the person who signs a note usually does ; and it is odd, that *Mr. Robinson*, who is proved to be a man of sense and business, should not write a note of this consequence himself. However suspicious these circumstances are, I must now take the note to be a good one, and signed by the intestate *Mr. Robinson*.

AS TO THE SECOND POINT, Where the plaintiff prays relief upon the head of fraud and imposition, I am of opinion, there is no sufficient proof of that to relieve against this note ; for though the note was given voluntarily, and at an inn, yet that is not sufficient proof to presume an imposition upon *Mr. Robinson* ; and the rather, because it is proved by *Mrs. Fuller*, that *Mr. Robinson*, some days after he had given the note, told *Mrs. Fuller* that he had done so, and ordered the note to be brought down stairs, which was done accordingly, and he acknowledged that to be the note he had given. This therefore takes it out of the head of fraud and imposition ; though it seems very odd, that *Mr. Robinson*, who intended to leave *Mrs. Cox* a thousand pounds at his death, should give a note for so much money payable immediately upon demand, and not after his death, and thereby make himself liable to pay it in all events, and perhaps, upon some disgust, to be thrown into prison during his own life ; and this done by a person who is proved to be a man of prudence and business. Odd as this is, it is not enough to induce this Court to relieve against this note upon the principle of fraud.

But the ground upon which I am of opinion to relieve against this note is, what the plaintiff has made THE THIRD PART of her equity, the *turpis causa* ; and the reason why this Court relieves against notes and securities entered into, where the consideration is criminal, is from a general policy to destroy the credit of such notes, and to discountenance the offence. The evidence as to the character of this woman is extremely strong, and the Court can hardly have a stronger before it ; for it is proved by multitudes, that she had no other visible methods of living but by entertaining gentlemen. It is proved, that she applied to porters at taverns to send for her when any gentleman wanted a lady of the town ; that she was in the hospital for the worst of distempers ; and she seems so sensible of the truth of this character, that she does not offer any defence for herself, but rather confesses a life of prostitution before her marriage, and down to that time ; and her evidence goes only to her behaviour for the last five years after her marriage ; and the mother

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mother is not examined to prove the goodness of her character before. The mother indeed proves, that *Mr. Robinson* before her marriage took her a house, and made her an allowance of no less than one hundred pounds a-year ; which is evidence enough to me of his keeping her : so that she is plainly proved to be a whore down to her marriage : and I am of opinion, that the same criminal commerce was continued between *Mrs. Cox* and *Mr. Robinson* even after the marriage, and at the time of giving the note ; for though she is married to *Mr. Cox*, she still keeps up a correspondence with her keeper, who visits her once a-week, and if sickness or business interrupted, he never failed to send a letter : he often went out with *Mr. Cox* and his wife upon little excursions of pleasure about town, and talked of coming to live in the same house : and those are sufficient testimonies to me to prove a criminal conversation after the marriage ; for we must admit such evidence as the nature of the thing will bear, and the evidence needs not to be so direct in the present case as in an action by a husband for criminal conversation, or in a suit in the spiritual court for a divorce.

It is admitted, that there are many cases where bonds entered into *ex turpi causa* have been set aside by this Court ; but a distinction has been taken, that where such a note or bond has been given to a woman who has been modest to the rest of the world, and lain with none but the man who has given her such note or bond, the Court will not relieve against such bond, but will let it take its legal effect, and considers the money as a reward for the loss of reputation, and as *præmium pudicitie* ; but the manner of life of the defendant *Mrs. Cox* can by no means intitle her to the equity of this distinction.

Another distinction has been endeavoured at, that where a person of prudence, and with his eyes open, enters into a note to a woman of the town, that even there the Court will not relieve against it, though it is given *ex turpi causa* ; and there must be other favourable circumstances in favour of the plaintiff who prays to be relieved, as where he is very young or dotingly old, and so worked and imposed upon by the woman : but I do not know that any of the authorities have gone upon that distinction. In the case of the *Marquis of Annandale v. Harris* (a), it was admitted upon the argument, for I was of Counsel both here and in the house of lords, that if *Mrs. Harris* had been a lewd woman, or a common whore, there would have been relief against the security ; but as she was a modest woman until debauched, the Court decreed her the benefit thereof as *pretium pudoris* ; and the late *Marquis* was neither a young gentleman nor a doting old one, but a very sensible shrewd man. And the ground wherefore the Court relieves against these securities is from a presumption, that as women of the town are

(a) 1. Eq. Abr. 31. 87. 3. Brown's Cases in Parl. 445. 2. Peer. Wms. 432.
—See also *Cray v. Rook*, Forrester, 153.

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full of design and artifices to impose upon people, that they therefore do make use of such artifices, and are guilty of some fraud or imposition, in getting such notes; and this presumption is made from general principles of policy, to discountenance the offence, and to destroy the credit of such securities; and therefore to prevent women of the town taking any advantage of their artifices, the Court says, such a general presumption shall run against them, that they may take no advantage of such securities (a).

(a) Priest v. Parrot, 2 Vezey, 160. Rook, Forrester, 153. Walker v. Perkins, 3. Burr. 1568. Whaley v. Norton, 1. Vern. 483. Clerk v. Periam, 2. Atk. 333.
Mathew v. Hanbury, 2. Vern. 187.
Bainham v. Manning, 2. Vern. 242.
Turner v. Vaughan, 2. Will. 339.
Hill v. Spencer, Amb. 641. Cray v.

Case 96.

Man against Parkinson.

Lincoln's-Inn-Hall, July 14, 1741.

Defendant was brought from the Fleet upon *alias pluries habeas corpus*, for his contempt in not putting in his answer; and it was now moved, that the bill might be taken *pro confesso*; and so ordered. Though
THE LORD CHANCELLOR at first doubted, whether upon such a personal contempt, as well as where a sequestration goes against a person's estate for not putting in answer, it should not be put into the paper.

THE DEFENDANT Parkinson was brought up from THE FLEET upon an *alias pluries habeas corpus*; he having been committed for a contempt in not putting in an answer to the plaintiff's bill.

The plaintiff's Counsel now moved, that it might be taken *pro confesso*.

THE QUESTION was, Whether the bill upon a personal contempt could be taken *pro confesso* upon motion only? and, Whether it should not be put down as a cause in the paper? as it must be where a sequestration goes against a person's estate for not putting in an answer.

HARDWICKE, Lord Chancellor. This motion was made last Term, and I was in some doubt about granting it; for if the cause is put in the paper, the defendant will, by the rules of this Court, have a longer time to put in his answer, and the bill will not so soon be taken *pro confesso*; but the defendant will have better notice upon motion to have the bill taken *pro confesso* for a personal contempt, and here, than where the cause upon a sequestration is put in the paper; for in case of a sequestration, which is a process against the estate, and not the person, of the defendant, there is no occasion to give personal notice; for upon a return to the sequestration of *nulla bona*, the cause is ordered to be put in the paper, and the clerk in court attending with the bill, it shall be read, and taken *pro confesso*, and there is no necessity of having the party in court; and this was settled in two cases in my LORD NOTTINGHAM's time: but in this case of a personal contempt, where the plaintiff comes to move to have his bill taken *pro confesso*, the defendant will have better notice of the motion, for he must be brought up upon an *alias pluries habeas corpus* into court, and the clerk in court must attend with the record of the bill, which being read must then be taken *pro confesso*: and there is a precedent of this shewed to me in my LORD KING's time, in a cause wherein the
Earl

MAN
against
PARKINSON.

Upon which THE CHANCELLOR ordered the answer to be filed, and the prisoner to be remanded to THE FLEET until he should discharge his contempt.

Cafe 97.

THE TESTATOR, *Haskyn Styles*, being seised of several freehold and copyhold lands, mortgaged both for securing the repayment of a large sum of money, and accordingly surrenders were made of the copyhold estates to the mortgagee. *Haskyn Styles* then made his will, and devised his manors, messuages, farms, lands, tenements, and hereditaments, to a trustee, in trust in the first place for the payment of his debts, and then in trust to *A.* for life, remainder to *B.* in fee. The trustee died in the life of the testator; whereupon, after the death of the testator, the lands descended to *D.* his heir at law, subject however to the trusts of the devise. And upon a bill brought by the creditors and by *A.* and *B.* against *D.* the heir at law, to have an execution of the trusts, the question was, Whether, upon such general words in a devise, copyhold lands would pass? Case cited *Eq. Caf. Abr.* 124. *Rofs v. Rofs*; and see *Eq. Abr.* 122. pl. 5. 2. *Vern.* 585. 600.

HARDWICKE, Lord Chancellor. I have some doubt upon this devise, whether the copyholds pass; for if they do, the heir at law will be disinherited. It is clear, that if a man be seised of freehold lands, and of the legal estate of copyhold ones, and make a general devise, the copyhold was not named in this devise, in case there should be any surplus after debts paid, it would go to the heir at law; but reserved this point; though he said, devise by a mortgagor or *cestui que trust* would be good without surrender of copyhold, because such surrender could not be had.—Forrester's Rep. 78, 79. 1. Wms. 443, 444. Chan. Precedents, 37. 407.

devise

GIBSON
against
STILES.

devise of "all his manors, messuages, &c." and make no surrender to the use of his will, the copyhold lands will not pass (a). But it is said, a surrender is out of the present case; for as the testator was only seised of an equity of redemption in the copyhold lands, and had no legal estate, it was out of his power to make a surrender: and I must admit, that it has been determined that where a person is only a *cestuy que trust* of a copyhold, and the legal estate is in a trustee; or where a person has only an equity of redemption of a copyhold, the estate at law being in the mortgagee; an express devise of the copyhold estate by the *cestuy que trust* or mortgagor will pass the copyhold estate without a surrender, for that is impossible to be made; and such a devise will bind a trust or equitable interest. But this is neither of the cases; for though *Mr. Haskyn Styles* had only an equity of redemption in the copyhold, which might pass by a devise, yet he has made no express devise of it; but he only made a general devise of "all his manors, messuages, &c." without any direct mention of copyhold lands. So that this is not very clear, whether the deviser intended to include his copyhold estate, his freehold lands being sufficient to satisfy the words of his will. But undoubtedly, in relation to creditors, the Court will make a sufficient construction to include the copyhold, if the freehold lands should fall short of satisfying them. But if there should be a surplus of the copyhold estate after a discharge of the mortgage, the question will be, Whether such surplus shall go to *A.* and *B.* who are volunteers, in prejudice and disherison of an heir at law? And I do not know any case where a copyhold estate has been construed to be included in such general words of a devise, where the question has been between a volunteer and an heir at law. But this point must be reserved.

(a) See *Brunker v. Cook*, 11. Mod. 128. *Ibbot v. Cowling*, 6. Term Rep. 63.

Case 98.

Chapman against Turner (a).

At the Rolls, February 26, 1738-9.

Joint admini-
strators and ex-
ecutors must
retain their
debts ratably
and in propor-
tion to the assets.

A. AND **B.** equal creditors by bond to **C.** who died intestate, took out a joint administration of his goods and effects, and possessed themselves of what effects they could get into their hands.

A. possessed himself of sufficient to pay his debt, but there was not enough left to pay **B.** his debt. Whereupon he brought his bill against **A.** the other administrator, to have him account for what he had received, and that both might be paid their respective debts in proportion to the assets left by the intestate.

THE QUESTION therefore was, Whether one administrator can retain for his own debt against another administrator, who has an equal right with him by virtue of the joint administration, and an equal demand by virtue of his bond?

(a) From Mr. *SHORT*'s manuscript.

It

It was agreed by all sides, that there was not a case in any of the Books exactly in point to this. The nearest to it is one in 1. *Ro. Abr.* 922. cited by MR. FAZAKERLEY, where there were two executors or administrators, and one paid a debt due from the intestate to another with his own money, for which he retained so much of the intestate's goods as amounted in the value to the debts paid, and then dies intestate. His administrator took possession of these goods with the other of his intestate. Upon which the surviving executor brought an action of trover against the administrator of the deceased executor for these goods. But it was held, that the deceased executor might retain them for the debt which he paid of testator's; and therefore his administrator was well entitled to them by the administration, and might retain them against the surviving executors.

But VERNY, *Master of the Rolls*, said, that the executor did not take the goods as a retainer for the debt which he paid, but as a purchaser of them for a valuable consideration; for an administrator or executor cannot pay debts with the specific goods or effects of a testator or intestate, but he must sell these goods or effects, and pay the debt with the money arising from such sale. Therefore if an administrator pay a debt of the intestate's, and take goods, &c. to the amount of that debt, he is to be looked upon as a purchaser of those goods for a valuable consideration, and so his executor or administrator will be entitled to such goods in the same manner as to any other of the testator's or intestate's goods.

AND IT WAS ORDERED, That an account should be taken of the intestate's effects, and that both *A.* and *B.* should be paid their debts rateably and proportionably to the assets left by the intestate.

Partridge against Partridge (a).

Case 99.

Michaëlas Term, 10. Geo. 2. 1736.

THE plaintiff's husband, by his will, dated the third of August 1720, gave her the interest and dividends of one thousand pounds *South-Sea* stock for life, and gave the residue of his estate to his younger children. The testator at the making his will had one thousand eight hundred pounds *South-Sea* stock, but before *Midsummer* 1733 sold out all of it, except two hundred pounds, and bought in more again, by which it was reduced to sixteen hundred pounds; and by an act, 6. *Geo. 2.* enacting, that the share of every *South-Sea* proprietor should be divided into four equal parts, three of which were converted into *South-Sea* annuities, and the other fourth to remain stock, the same was reduced to four hundred pounds, out of which another legacy of one hundred pounds *South-Sea* stock being deducted, there remained now but three hundred pounds to answer the legacy of one thousand pounds.

The plaintiff brought her bill against the executors and younger children for the benefit of this devise; and upon the hearing,

(a) From MR. SHORT'S MS.

CHAPMAN
against
TURNER.

If a person has 1800l. stock in the funds, and devises 1000l. of it, and afterwards sells 1600l. and then buys 1400l. and between the making of the will and the testator's death the Legislature changes that kind of stock into annuities, these circumstances make no alteration in the legacy.

S. C. 2 Eq. Ab.

570.

MR. S. C. Talb. 226.

PARTRIDGE
against
PARTRIDGE.

MR. RYDER, *the Solicitor-General*, insisted for the defendants, that the devise of one thousand pounds *South-Sea* stock was a specific legacy (a); and the testator, after making his will, having sold all his *South-Sea* stock except two hundred pounds, though he afterwards bought in more, this was a revocation of his intention *pro tanto*; and cited *Ashton v. Ashton* (b), at THE ROLLS, which was affirmed by THE CHANCELLOR. That if this should not be a revocation of the legacy, yet the testator having only four hundred pounds *South-Sea* stock in his name at his death, and having given another legacy of one hundred pounds *South-Sea* stock to his wife, there remained only three hundred pounds to answer the legacy of one thousand pounds; and it being a specific devise, the deficiency ought not to be made good out of any other part of the testator's estate.

TALBOT, *Lord Chancellor*. The devise of one thousand pounds *South-Sea* stock is rather descriptive than specific; and as the testator had, at the time of making his will, sufficient *South-Sea* stock to answer this devise, he selling it out afterwards, to answer some particular occasions of his own, ought not to be construed an ademption of the legacy, or any alteration of his intent in regard thereto (c). And if the selling out the stock could by any means be taken to be an alteration, so that his wife should not have the benefit of this devise, his afterwards buying in a further sufficient quantity of stock was as strong an indication that she should have the benefit of this devise, as his selling of it out before was that she should not. As to the act of parliament, it was the act of the Legislature, to which the testator was no way concurring, and therefore could not make any alteration in his intention (d).

And therefore decreed, that the widow should stand in the same place, with respect to this one thousand pounds *South-Sea* stock, as the testator would have done if he had been living; and decreed, that the widow should have two hundred and fifty pounds *South-Sea* stock and seven hundred and fifty pounds *South-Sea* annuities, to stand in the name of the executors, and they to execute a declaration of trust of it according to the will.

(a) See *Hinton v. Pinck*, 1. Peer. Wms. 540. *Purse v. Snäplin*, 1. Atk. 414. *Ashburner v. Macguire*, 2. Brown. C. C. 109.

(b) *Cafes T. T.* 152. S. C. 3. Peer. Wms. 184.

(c) *Hambling v. Lister*, Ambl. 402.

(d) See *Bronsdon v. Winter*, Ambl. 57.

Case 100.

Northey against Northey.

In Chancery, November 10, 1740.

Parties to a bill.
S. C. 2. Atk. 77.

A. DEVISES his wife's *paraphernalia* to his two daughters, and makes B. his executor. The wife files her bill against the executor alone for her *paraphernalia*, without making the two daughters defendants.

HARDWICKE, *Lord Chancellor*. This question concerns only part of the will; and if you expect a decree for this particular part, you must have the legatees before the Court. The husband gives these *paraphernalia* as a specific legacy, and the daughters and wife both

both claim in part from the same person, and therefore all the claimants must be before the Court. The wife might have brought *trouver* for them against the executor alone ; but here both the legal and trust or equitable part is brought in question ; and this Court will consider the executor as a trustee for the specific legacy.

NORTHEY
against
NORTHEY

Ordered that the plaintiff amend her bill.

Kennedy against Ackland (a).

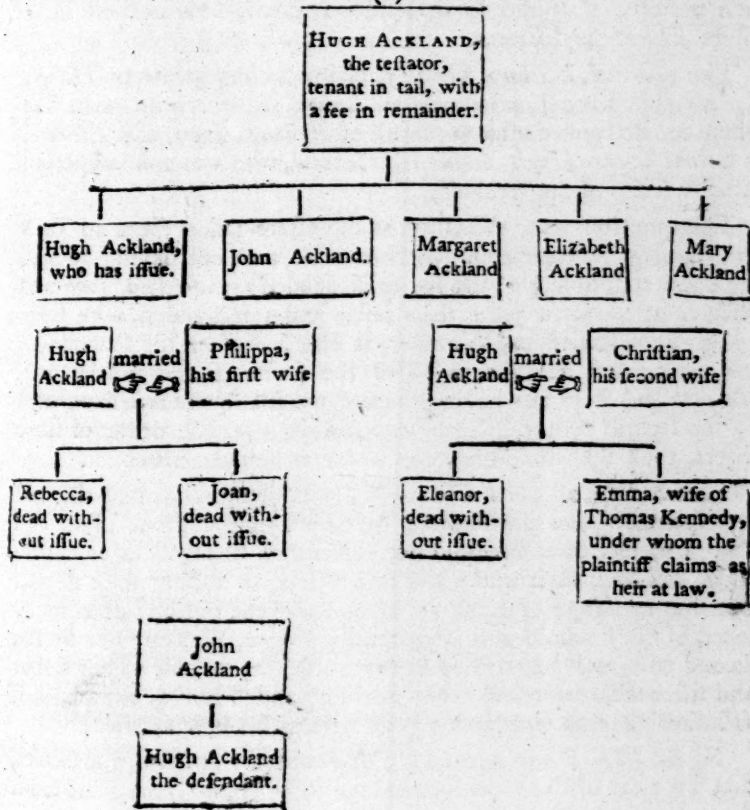
Case 101.

Hilary Term, 13. Geo. 2. 1739.

HUGH ACKLAND, the father, being tenant in tail of the lands in question, with the fee-simple expectant, devised them to his son *Hugh Ackland*, and died, leaving issue two sons, *Hugh* and *John*, and three daughters, *Margaret*, *Elizabeth*, and *Mary*, who all died without issue. *Hugh Ackland*, son of *Hugh* the testator, being thus seised, married his first wife *Philippa*, on whom the lands were settled in special tail, and *Hugh*, by that settlement, was tenant in tail with the fee expectant upon failure of issue. *Hugh*, by *Philippa* his first wife, had issue two daughters, *Rebecca* and *Joan*, and by *Christian* his second wife two more, *Eleanor* and *Emma*. *John*, the second son, had issue *Hugh Ackland*, the present defendant, and is dead (b).

(a) This case was transcribed from the manuscript of Mr. SHORT.

(b)



KENNEDY
against
ACKLAND.

Hugh Ackland, son of the first testator *Hugh*, died, leaving issue four daughters. The estate which was created by the marriage-settlement with the first wife *Philippa*, descended on the first two daughters of that marriage, there being no son; but the reversion in fee fell on all the four daughters equally, they being all related in equal degree to the common ancestor, *Hugh Ackland*.

And it is upon this descent of the fee that the present question arises.

Joan and *Rebecca* died without issue, or without docking the intail, as also did *Eleanor*, one of the daughters by the second wife *Christian*.

Emma, being thus left the only surviving daughter, intermarried with *Thomas Kennedy*, who is since dead, leaving his brother, *William Kennedy*, his heir at law; and as such he claims the estate in question.

Emma, the wife of *Thomas Kennedy*, upon her marriage with him levied a fine, &c. to the uses of that marriage, &c.

The defendant *Hugh Ackland* claims as son and heir to *John Ackland*, brother to *Hugh Ackland* the second, and heir at law to *Rebecca* and *Joan*, on whom, he says, the moiety of the fee descended after the death of their father *Hugh Ackland* the second; for being of the whole blood to them, as their uncle, he will be entitled to such moiety, if it did so descend on them, before their half-sisters *Eleanor* and *Emma*.

The plaintiff, *William Kennedy*, claims as heir at law to *Thomas Kennedy*, his brother, who married *Emma*, on whom he insists the whole fee descended after the death of *Rebecca*, *Joan*, and *Eleanor*, as heir at law to *Hugh Ackland* the second, who was the last person actually seised of the freehold.

The question was, Whether, as the estate-tail is spent in *Joan* and *Rebecca*, by their dying without issue and not having docked the intail and moiety of the fee so descended on the said *Joan* and *Rebecca* as to make *John*, their uncle and heir-general, take their moiety by descent? or, Whether, as *Hugh Ackland* the second was the person last actually seised of the freehold and inheritance, *Rebecca* and *Joan* not having docked the intail, the two daughters by the second venter, *Eleanor* and *Emma*, after the death of their sisters, took the whole reversion in fee as heirs to him?

HARDWICKE, Lord Chancellor, was of opinion, that the tail was spent in *Joan* and *Rebecca* by their dying without issue, and that a moiety of the fee did not descend on them, so as to entitle *John Ackland*, their uncle and heir at law, to it after their death: but that as *Hugh Ackland* the second was the person last actually seised of the freehold and inheritance, *Emma*, his daughter by the second wife, will be entitled to the whole fee, as heir to her father and sister *Eleanor*; and from her husband *Thomas*, the plaintiff *William Kennedy* will have a good title as his heir at law.

N. B. MR. FAZAKERLEY is of a contrary opinion, and thinks, that a moiety of the fee descended on *Rebecca* and *Joan*, and from them *Hugh*, the defendant, is entitled to their moiety.

The Lord Mayor and the Aldermen of York *against* Sir Lionel Pilkinton and Others. Case 102.

In Chancery, Easter Term, 15. Geo. 2. 1742.

THE PLAINTIFFS brought their bill against the defendants for an exclusive right to fish in the *River Ouse*, in *Yorkshire*, and to be quieted in the possession of such fishery, to prevent multiplicity of actions.

The defendants by answer insist, that they are lords of several manors, and of very large estates along the banks of the *River Ouse*, and that they have always used to fish in such parts of the river as are contiguous to their land.

The plaintiffs, pending this suit, indicted several persons in **THE COURT OF SESSIONS** for the city of *York*, for fishing in the river under an authority from the defendants.

The defendants now moved for an injunction to stay proceedings upon these indictments, upon an affidavit that the mayor and aldermen, who are plaintiffs in the cause, are in the commission of the peace for the city of *York*, and consequently would be judges in their own case.

MR. ATTORNEY-GENERAL opposed the motion by denying the jurisdiction of this Court to stay proceedings in pleas of the crown, although the question depends upon a matter of right which is submitted to the determination of this Court.

MR. BROWN replied, that it was very extraordinary that the plaintiffs, who come to establish their exclusive right of fishing by bill in this Court, should, when the thing is ripe for hearing, take this other method of proceeding by indictment, which in some measure will try the very right; for the defendants to such indictments cannot be guilty of the trespass, if the persons who authorised them had a right to fish. Besides, as they have brought their bill in this Court, and have submitted their title, they have concluded themselves from proceeding in any other court or method; and if they do, this Court will grant an injunction.

HARDWICKE, Lord Chancellor. Where criminal proceedings relate to matters left to the determination of this Court, I should not hesitate to stay proceedings; and this Court has often done it. An information was brought in the name of the attorney-general, in order to settle a right in a highway; and upon motion, there was an order of this Court to stay the proceedings in an indictment for a repair of the highway in the sessions until such information was determined in this Court. Suppose a right to the boundaries of a manor was disputed in this Court, and there was an injunction to stay proceedings in an action of trespass, and the party should change his action of trespass to an indictment of trespass, I should have no scruple to stay his proceeding.

ment for trespass in which was no violence, and is to try a civil right, which is the subject of an action, it can order the prosecutor, who is plaintiff now before the Court, not to proceed.—S. C. 1. Atk.

The plaintiffs claiming an exclusive right of fishery, brought their bill to be quieted in the possession of it, and to prevent multiplicity of actions. The defendants by answer insist on a custom they have of fishing on the borders of their land. Pending the suit, plaintiffs indicted several persons in the court of sessions for the city of *York* for fishing under an authority from defendants.

And now, upon affidavit that the mayor and aldermen, plaintiffs, are in commission of the peace for *York*, and consequently would be judges of their own case, defendants moved for an injunction to stay proceedings on these indictments.

LORD CHANCELLOR. Though this Court cannot grant an injunction to stay a criminal proceeding at the suit of the crown, so as to restrain the attorney-general, yet as this is an indictment

LORD-MAYOR
OF YORK
AND THE
ALDERMEN
against
SIR LIONEL
PILKINGTON
AND OTHERS.

His Lordship was now obliged to go to the house of lords, and ordered this motion to stand over until the next day, when he spoke to this effect :

The defendants in this cause had another method of gaining what they attempt by this motion. If they had gone to the attorney-general, and had shewed him, that the indictment was not for any violence or breach of the peace, but was the dispute of a civil right, and the proper subject of an action of trespass to try that right, he to be sure would have granted a *cesset processus* or *nolle prosequi* almost of course, especially where one of the parties whose right was involved in the substance of the indictment was to be judge of the indictment.

But as the parties have prayed for their remedy in this court by motion, we must see how far we can assist them. This proceeding of the plaintiffs by way of indictment is improper upon two accounts : In THE FIRST place, they are making themselves their own judges ; and in THE SECOND, they are in some measure going to the decision of a right which they themselves have submitted to the decree of this Court. Besides, as the prayer of the plaintiffs bill is to prevent multiplicity of actions, they are acting quite inconsistently with what they pray ; and the question will be, Whether this Court can stay these proceedings, which are not actions in the name of *the party*, but a prosecution in the name of *the king* for a breach of the peace ? And to be sure this Court has not such a general jurisdiction as to grant injunctions to stay criminal proceedings which are at the suit of the crown, for the attorney-general may still proceed. But where a matter of property is laid before this Court for its judgment, and the plaintiff in the cause indicts the defendant for a trespass upon the land, without any violence or breach of the peace, which trespass might now properly be the subject of an action, it being attended with no marks of violence, and is to try a civil right ; there the Court, though it cannot grant a formal injunction to close the hands of the attorney-general, yet it can and will make an order on the prosecutor, who is party to a bill in this Court, not to prosecute : and that is the very case before the Court ; for it is sworn, that the indictment found at the sessions is merely for fishing, without any circumstances of misbehaviour which tend to a breach of the peace ; and the question upon such indictment can only be upon the civil right, which is the subject of an action, and is already before this Court, which will make an order on the prosecutor, who is a party to a suit for the same thing in this court, not to proceed on the indictment until his right is at in at period his court. As suppose a bill here to settle the right of lands, and there are several entries, and indictments brought by some of the parties for those forcible entries, which indictment is a remedy by act of parliament for breach of the peace, and also a civil remedy for the benefit of the party, yet the Court will stay the party from proceeding in this indictment for his own benefit until his right to the lands in the bill is determined in this court.

Therefore

Therefore let there be an order on the plaintiff to stay him from prosecuting the defendants or their agents, either by way of action or indictment, for exercising the right of fishing claimed by the defendants in their answer, until the hearing of the cause or further order.

LORD-MAYOR
OF YORK
AND THE
ALDERMEN
against
SIR LIONEL
PILKINTON
AND OTHERS.
Case 103.

Lockwood and Others *against* Ewer and Others ;

OR,

Lady Child and Others *against* Chanstler.

In Chancery, Easter Term, 15. Geo. 2. 1742.

THIS was a bill brought by the representatives of *Sir Thomas Coke* against the representatives of *Mr. Ewer*, in order to have a redemption of two thousand five hundred pounds *East-India* stock, upon the payment of what should appear to be due for principal and interest on an original loan of two thousand pounds, for which the said two thousand five hundred pounds *East-India* stock was mortgaged to *Mr. Ewer*.

THE CASE was thus: In the year 1708 *Sir Thomas Coke*, being governor of the *Old East-India Company*, and having occasion to borrow two thousand pounds, but not thinking it discreet that the Company should be acquainted with his want of money, applied himself to *Mr. Walters*, in whose name, as the bill charges, part of his stock stood, and desired him to borrow this sum of *Ewer* as of his own proper account ; which *Mr. Walters* accordingly did, and for security assigned to *Mr. Ewer* two thousand five hundred pounds *East-India* stock, and also gave his own bond for the payment of the money in *July* following. *Mr. Ewer* on his part, at the same time, by his deed-poll of defeasance, obliged himself to re-transfer the two thousand five hundred pounds upon payment of the principal and interest by *July* next ; and at the same time, as the bill charges, *Sir Thomas Coke* gave to *Mr. Walters* a bond of indemnity for the bond he had given on his account ; but there was no proof of this in the cause. Afterwards, in the same year, the stock belonging to that Company sunk in its value ; they made several calls upon the proprietors by reason of their wanting money, and *Ewer* paid near fifty pounds *per cent.* on account of these calls for the stock of two thousand five hundred pounds, which was so transferred to him ; inasmuch that, upon paying the last call, there was twenty-four pounds ten shillings due to *Mr. Ewer* above the two thousand five hundred pounds *East-India* stock. In 1709 the *Old and New East-India Companies* were united, and by that means the credit of their stock increased. After that, in the same year, 1729 *Sir Thomas Coke* died, and left *Lady Coke* his executrix, who made no proposals for any redemption, but *Mr. Ewer* continued in the quiet receipt of the dividends until 1715, when he died ; but before that time he had sold out this two thousand five hundred pounds, and united it with his own gross stock of about fourteen thousand

In the year 1708 *A.* borrows of *B.* 2000l. and for security assigns to *B.* 2500l. *East-India* stock, and gave his bond for the same sum payable *July* following ; *B.* signs a defeasance, by which he covenants, that if *A.* paid principal and interest in *July* he would re-transfer. The stock sinking in value, several calls were made, which *B.* paid ; and upon the last call *B.* had paid 24l. over and above the 2500l. ; and the stock afterwards increased in its value. *B.* continues in possession until the year 1715, and then sells out this 2500l. stock, and united it to other stock of his own, and died ; and in 1729 a bill is brought to redeem, but was dismissed on account of the length of time ; and this being a personal pledge,

there was no occasion to foreclose.—S. C. 2. Atk. 303.

T 2

pounds.

LOCKWOOD
AND OTHERS
against
EWER
AND OTHERS;
OR,
LADY CHILD
AND OTHERS
against
CHANSTILET.

pounds. In the year 1719 *Lady Coke* died, making *Mr. Lockwood* her executor, who, in a few years after he had discovered that this equity of redemption was in trust for *Sir Thomas*, brought his bill, viz. in the year 1729. *Mr. Walters* also died, but at what time is not very certain. His representatives however, who were made defendants in this cause, admitted, that what *Mr. Walters* did was done as trustee for *Sir Thomas Coke*.

And the question upon this case was, Whether the representatives of *Sir Thomas Coke*, who are plaintiffs, should be admitted to a redemption of this *East-India* stock, which was mortgaged in 1708, and this bill not filed until 1729, which is above twenty years? and, Whether they should not be admitted to a redemption, notwithstanding the length of time, as there was no bill for a foreclosure?

IT WAS ARGUED for the plaintiffs to this effect, by NOEL, WELDON, WALLER, and MURRAY.—This whole transaction was of a private nature, and carried on in the name of a third person. *Sir Thomas Coke* died in one year after the mortgage, and made *Lady Coke* his executrix; but she did not ever discover that the equity of redemption of this stock belonged to *Sir Thomas Coke*, although she lived until 1719. After her death her representative, *Mr. Lockwood*, discovered the trust, and in a few years afterwards filed his bill, viz. in 1729; so that the account of time which is to run against a redemption is only to be taken from the time of the discovery, and not from the time of the mortgage made, and then the bill will be brought in a proper time for a redemption. The Court will not admit time to run against an infant; and the plaintiffs ought to have the same privilege, for it was not possible for them to bring a bill for redemption of what they did not know belonged to them: before they ought to be precluded from a redemption, *Mr. Ewer* ought to have foreclosed the equity of redemption.

Redemption of mortgages subject to statute of Limitations for making entries and bringing ejectments; but where mortgagee enters and holds until the mortgage is satisfied, as in *Welsh* mortgages, there no time bars the mortgagor's redemption.

It has been often mentioned in this court, that the *statute of Limitations*, as to making entries and bringing ejectments, is the rule the Court directs itself by in the redemption of mortgages. But that is not the only rule; for the particular circumstances of a case are also to be taken into the account, as appears in two cases in *Vernon*. The first is that of *Orde v. Heming* (a), where a bill was to redeem a mortgage; and the defendant demurred by reason of the plaintiff's own shewing, for it appeared the mortgage was sixty years old; but the demurrer upon argument was over-ruled, because it was charged in the bill, that the mortgagor agreed that the mortgagee should enter and hold until he was satisfied, which is in the nature of a *Welsh* mortgage; and in such case the length of time is no objection. The second case is *Proctor v. Cooper* (b): The bill was filed in 1700 to redeem a mortgage made in 1642; the mort-

1. Vern. 418.

2. Vern. 481.

(a) 1. Vern. 413. 2. Vern. 481.

1. Eq. Abr. 314.

(b) 1. Eq. Abr. 314. 2. Vern. 377.

2. Eq. Abr. 611. Prec. in Chan. 116.

gagge entered in 1650; there were three descents on the part of the defendant, and four on the part of the plaintiff; yet the length of time being answered for the greatest part of the time by infancy or coverture, and forasmuch as in 1686 a bill was brought by the mortgagee to foreclose, and an account then made up by the mortgagee, the Court decreed a redemption, and an account from the foot of the account in 1686. As to the length of time, this case differed from the redemption of lands, where the profits and outgoings being uncertain, and the mortgagee having entered and been in possession several years, and considered the estate as his own, perhaps he may have made such improvements, and have met with such accidents from bad tenants and repairs, as it would be very difficult for him to give a regular account of: but in the present case it is otherwise; for in the case of *East-India* stock the mortgagee can have been at no expence or improvements, and the account will be taken without any sort of difficulty or prejudice to the mortgagee; for he has only on one side of the account to charge the mortgagor with the principal and interest for so many years, and on the other side of the account to give him credit for so much as he shall have received upon the dividends of the *East-India* stock, which he will easily collect from the Company's books, which are things of a public concern, and lie open to every proprietor of stock.

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AND OTHERS
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East-India stock is a species of personal property which has arose within less than a century, and makes an annual profit, and so differs from any other dead personal thing which lies in the hands of the pawnee without any profit arising from it, as jewels, plate, &c.; and this will make a difference as to the redemption; for a Court will lean against the redemption of such a dead piece of personalty when it has lain in the hands of a pawnee for any length of time; but it will be otherwise of *East-India* stock, because that is annually paying a sort of interest to the pawnee.

In the case of a rent-charge, this Court had redeemed after eighty years time; and they took a difference between a redemption of a rent-charge and of land (a).

MR. ATTORNEY-GENERAL for the defendants. This transaction was in 1708, and *Mr. Ewer* lived after this mortgage until 1715, and his representatives had no demand at all upon him for any account of the two thousand five hundred pounds *East-India* stock, and therefore imagined all demands for a redemption to be at an end: nay, *Mr. Ewer* considered it in this light himself, for he sold it out, and united it with his gross stock.

But supposing this *East-India* stock to be redeemable, it is not redeemable by *Sir Thomas Coke's* representatives, the present plaintiffs, for the bond of *Mr. Walters* is produced, and the transfer of the stock from *Mr. Walters*, and the defeasance of *Mr. Ewer* to *Mr. Walters*; but there is no evidence in the world that

(a) *Floyer v. Lavington*, 1. Peer. Wms. 270.

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this was a mortgage from *Sir Thomas Coke* by *Mr. Walters* as his trustee; and therefore *Sir Thomas Coke's* representatives cannot redeem, for the transaction being in *Mr. Walters'* name, it must be taken to be his stock; and the plaintiffs ought to have shewed some deed of trust from *Mr. Walters* to *Sir Thomas Coke* of this stock, and that there was a transfer of it from *Sir Thomas* to *Mr. Walters*; which they have not done: the only evidence is, the admission of the executors of *Mr. Walters* in their answer to stand as trustees for *Sir Thomas's* representatives for the stock; but that will be no evidence against us; for though it may bar *Mr. Walters'* executors from any claim which they may make against us, yet it cannot give a right to *Sir Thomas's* representatives to set up any claim of redemption against us,

On pledges of personal things, if the pledger does not redeem them at the day, the pawnee may sell them without a decree to foreclose.

Mr. Ewer had a right to sell this *East-India* stock as soon as ever it was forfeited by the non-payment of the principal and interest on the day fixed for it. The common known principle upon pledges of personal things is, that if the pledger do not redeem them at the day, the pawnee may sell them without any previous decree for a foreclosure. This case differs from that of a rent-charge, which is a real thing, and is as fixed and substantial as the land itself; and in the case of *Floyer v. Lavington*, in which the case of *Widdrington v. Jennings* is cited, the Court denied a redemption of a rent-charge after sixty years, almost purely for the length of time; and LORD HARCOURT said, the Court had already gone too far in permitting redemptions,

It is very inconvenient that these personal things should be always looked upon as redeemable, for length of time carries with it a presumption that *Mr. Ewer* was a purchaser of the equity of redemption of this stock from *Mr. Walters* or *Sir Thomas Coke* the cestui que trust; and though there would be no difficulty in taking the account of stock and its dividends, yet that is not the presumption the Court goes upon in the redemption of mortgages, for it is that property may be quieted; and there is a period of time when the party must assert his right; and the same length of time shall bar a redemption in equity as bars an entry by statute.

HARDWICKE, *Lord Chancellor*. I am of opinion, that this bill ought to be dismissed; for it would be very mischievous if this cause was permitted to proceed. If this had been land which had been mortgaged, the defendants could not have held it irredeemable without coming into this court for a foreclosure; but the thing pledged in the present case is not land, but personalty, viz. *East-India* stock; and it has been determined, that in such case the party has no occasion to come into this court for a foreclosure. That point was so settled in the case of *Tucker v. Wilson* (a), which was thus: One possessed of an exchequer-annuity for ninety-nine years borrowed money upon it, and for security there was an absolute transfer of the annuity, but with a disclaimer that if the money was

In case of personalty, no occasion to foreclose.

7. Peer. Wms. 267.

(a) 1. Peer. Wms. 267.

paid at such a day the assignment should be void ; the money was not paid at the day ; upon which the lender frequently desired the money, and gave notice that he would sell ; and appointing a time for the purpose, desired the borrower to be present to see that the annuity was sold at the full value : the borrower, by letter, desired the lender to stay a week longer before he sold, which was also complied with ; and then the lender dying suddenly, the defendant, his administrator, sold the annuity at the *Exchange* by a sworn broker for the full value that those annuities then sold for, and which was less than what the money due to the defendant amounted to : these annuities afterwards rose in value ; whereupon the mortgagor brought a bill to redeem, or to compel the defendant to purchase another annuity on the same fund, and of the same yearly value, to be transferred to the mortgagor on his payment of principal and interest : and HARCOURT, *Lord Chancellor*, said, Here is no express power to sell ; and annuities for ninety-nine years are like rent-charges out of lands, and not like stocks, which may be thought to be of imaginary value ; and there being no decree for foreclosing the mortgagor, nor any agreement in writing that the mortgagee should sell, let the defendant procure an annuity of the like value, and upon the same fund, to be conveyed to the plaintiff, upon his payment of the principal and interest to the defendant ; and let the master compute what is due for principal and interest : from which decree an appeal was brought in the house of peers, where it was insisted, that these exchequer-annuities, as well as stocks, were equally sold at the *Exchange*, and that this was but as a pawn ; and though there was no express power to sell in the defeasance, yet by the mortgagor's letters it was plainly submitted to, when the mortgagor desired the sale might be deferred for a week ; that the convenience of these securities among merchants was, that after the day of payment was passed they were taken to be ready money ; and that it would be infinitely troublesome and dilatory if there could be no sale of such annuity thus pledged without a decree of foreclosure ; that this would set aside several sales that had been made in the like cases, and occasion multiplicity of suits : wherefore the decree was reversed by the lords, *nemine contradicente*. In the present case, the plaintiff can be in no better condition than *Walters* himself would have been if he had been plaintiff ; for no proof has been made any otherwise than as it arises from an admission in the answer of *Walters'* executors, that he is barely a trustee for the benefit of the plaintiff ; and though it is true, that an admission in the answer of one of the defendants, that he is barely a trustee for the benefit of the plaintiff, is sufficient, provided the plaintiff has a good equity, yet it is not sufficient for any other purpose ; and if the plaintiff would draw any other argument from its being a trust, he must make proof in the cause that it is so. Suppose then *Walters* had brought this bill himself, What relief is it that he could ask after this length of time ? It is proved in the cause, that very soon after this pledge was made to *Ewer*, several calls were made by the *Old East-India Company* upon the proprietors, their stock being

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then in a decaying condition, and *Ewer* upon these calls paid in near fifty pounds *per cent.* As this has been so, can it be thought, because the stock is now more valuable, that this Court would have decreed a redemption in favour of *Walters* after this length of time? All the persons who were privy to this transaction are dead. In 1729, and not before, which was after the death of *Sir Thomas Coke, Ewer*, and *Walters*, a bill is brought by the executor of *Sir Thomas* in order to be allowed to redeem. If *Walters* himself had brought this bill after such length of time, he could not have been allowed any benefit from it; and the plaintiff cannot be in a better condition than *Walters* himself would have been. For these reasons the bill must be dismissed.

So his Lordship was pleased to decree accordingly.

Case 104.

Portman against Seymour.

In Chancery, Easter Term, 15. Geo. 2. 1742.

A. settles his freehold estate upon *B.* and the heirs of his body, with remainders over, and surrenders his copyhold held of the manor of *Taunton* to *C.* upon condition that he surrender to *D.* and his heirs, subject, however, to *A.*'s will. *C.* accordingly surrenders to *D.* and *A.* by will, reciting the surrenders, desires *D.* to contrive, if possible, that the copyhold might be continued to the owners of the estate at *Orchard.* *D.* surrendered this copyhold to the use of his will; and by the custom of the manor, a surrender after seven years is void, and the estate goes to the widow; and outlives the seven years, and dies, having first made his will, and devised the copyhold to *B.* in tail, with remainders over as aforesaid; and forasmuch as *D.* is only a trustee, equity will supply the defect; but there being no proof that it was possible by the rules of the manor to settle this copyhold in tail as the freehold, the cause was put off until further proof.

SIR WILLIAM PORTMAN being seised of a freehold estate at *Orchard*, in *Somersetshire*, settles it upon *Mr. Portman*, the plaintiff, and the heirs male of his body, with divers remainders over; and being also seised of a copyhold estate in fee, held of the manor of *Taunton-Dean*, in the same county, surrenders them to one *Mr. Cross*, upon condition that he surrender to one *Mr. Henry Portman* and his heirs, subject, however, in his hands, to the will of *Sir William Cross*. Accordingly surrenders were made into the hands of *Mr. Henry Portman*; and subsequent to the settlement of the *Orchard* estate, viz. on the 27th of *February* 1689, *Sir William* makes his will, and therein recites the purposes of the surrender to *Mr. Cross* and to *Mr. Henry Portman*, and then he goes on in these words: "And I desire of my cousin, the said *Mr. Henry Portman*, to contrive, if it is possible, that the said copyhold lands may be continued to the owner and owners of my estate at *Orchard.*"

Mr. Portman continues possessed of this copyhold land, which is liable to this particular custom, "that a surrender of any copyhold land to the use of a will is only good for seven years; and if the devisor live more than seven years after such surrender, it is as no surrender; and in such case, the widow is to have the estate as fully as an heir at law." *Mr. Henry Portman* surrenders this copyhold estate to the use of his will in 1717, and makes his will soon after, but outlives the seven years from the time of the surrender.

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By

By this will *Mr. Henry Portman* devised this estate to *Mr. Portman*, the plaintiff, with the same remainders over as are limited in the settlement in regard to the *Orchard* estate; and in the same will he devises to his wife a legacy of ten thousand pounds, "in full satisfaction and discharge of dower and thirds of or in any manors, &c. whereof or wherein I am or shall be interested, and in discharge of all estates which I have granted heretofore to her for life or years, whereof *Sir William* was heretofore seised." In the same will he further gives his wife his two best hunting-horses, the best pair of coach-horses, her wearing-apparel, her gold watch, and a great pearl necklace which she usually wore.

PORTMAN
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And the present bill was brought by the plaintiff *Mr. Portman*, who is entitled to the *Orchard* estate under the settlement, against several persons, and especially the widow of *Mr. Henry Portman*, who claims, as customary heir of her husband, to have an account of the rents and profits of the customary estate, and to have them surrendered according to the custom of the manor of *Taunton-Dean*, and to go according to the direction of the will of *Sir William Portman*.

MR. BROWN and *MR. FLOYER* argued for the plaintiff, *Mr. Portman*, That this copyhold estate was a trust in *Mr. Henry Portman*; and that if he has not executed the trust, the land shall be chargeable into whosoever hands it comes; that indeed, in the present case, *Mr. Henry Portman* had executed the trust defectively; for the surrender, as the case is circumstanced, is no surrender; yet the Court will supply such a defective execution of a trust; or if it will not, that the copyhold shall still be subject to the trust in the hands of the widow, *Mrs. Towns*, though she claims as a customary heir. For though this is not the case of an heir at common law, but by custom, yet that will make no difference; for whether it be heir at common law or custom, yet they both make titles from the same fountain, their respective ancestors. And where a person succeeds to an estate, whether as a common-law heir, or by custom, as a purchaser under a conveyance, yet the lands shall fall into all their hands loaded with the trust. In case of gavelkind lands, the customary heir has been held to be liable to the warranty of his ancestor. But it is here stronger, for it is in the case of a trust; and if a trustee do not execute his trust, or execute it defectively, the *cestuy que trust* shall not be injured, but the customary heir shall be answerable. An objection may be made to the declaration of this trust in *Sir William Portman's* will, wherein he desires his cousin to contrive some way to settle the copyhold estate on the owners of the *Orchard* estates, that this word "desire" is an expression so much at large as to leave it entirely to the discretion of *Mr. Henry Portman* whether to settle it or not; and that the word "desire" does not amount to a devise, but the word "desire" in a will is as strong as "I devise, will, direct, command," and that it is mandatory and obligatory in all respects; and there is no particular technical word for a devise, for any words which

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which express the intent of the testator are sufficient : and there is a case in 2. *Vern.* 228. where the very word "desire" is held to amount to a devise, and not to be discretionary. The other objection which we shall make to the widow is upon the will of her late husband *Mr. Towns*, wherein he gives her a legacy of ten thousand pounds in full of dower and thirds which she can claim of any of his estates, and in full of all estates for life or years out of *Sir William Portman's* estate. He then goes on and devises to her coach-horses, hunters, &c ; and in the same will he devises the copyhold estate in dispute to the plaintiff, and the heirs of his body. And the rule of law is, that whoever will take advantage of one part of a will must submit to every other part of the same will, as well to those parts which are to their benefit as to those which are to their prejudice ; and they cannot claim particularly, but must submit entirely. If so, and the widow claims the ten thousand pounds legacy, and the coach-horses, hunters, &c. in the other clause, she must not impeach our devise, but must let it be at rest.

MR. ATTORNEY-GENERAL, for the defendants, argued, that as to the latter objection upon *Mr. Henry Portman's* will, the legacy of ten thousand pounds was given only in restraint of dower and thirds, which is a particular right, and cannot restrain the present right, which the widow sets up as customary heir ; that the other clause, being only a devise of paraphernalia, gives her no more than what was her own before, and so is void.

That the *Orchard* estate being settled to *Mr. Portman*, the plaintiff, and the heirs of his body, with remainders over, and the copyhold estate being desired by *Sir William Portman*, if possible, to be settled in the same manner, it was incumbent on the plaintiff to have proved, that copyholds in the manor of *Taunton-Dean* are capable of being settled to the heirs of a man's body, with remainders over ; for if they cannot, the estate will be discharged of the trust, which is an impossible one, and will descend, according to the custom, to the widow, the defendant.

HARDWICKE, Lord Chancellor. If this customary estate is capable of being limited in the manner as *Sir William Portman* has settled his estate at *Orchard*, then the clause in his will declaring that he had made a surrender for the use of it, and that he had directed the surrenderees to contrive it, if possible, that his copyhold estate might go to the owner and owners of his estate at *Orchard*, according to his settlement, will make it very plain that it was a trust in the hands of *Mr. Henry Portman* ; and according to the case in 2. *Vern.* 228, 229. *Alcock v. Sparhawk*, the word "desire" is equal to devise, because it expresses the intention of the testator ; and the purpose of every will is to do no more. But if the copyhold estate is not capable of limitations of that kind, and *Sir William Portman* could not have surrendered the estate to the same uses as the *Orchard* estate is settled, then the plaintiff cannot be entitled.

But

But taking this estate to be a trust in *Mr. Henry Portman's* hands, and the question, Whether his customary heir is to have the lands subject to it? as to that I AM OF OPINION, that every customary heir, if he take merely as heir, is equally in the power of his ancestor with any heir at common law. But there have been cases in abundance relating to copyholds and *boroughs English* where an ancestor having surrendered and given his lands in such manner as would bind an heir at common law, it has been held, that it would also bind his customary heir; and if *Mr. Henry Portman* took this as a trust estate, its descending to his heirs by custom will not impede the trust. But if *Mr. Henry Portman* had had the legal estate subject to no trust, and had made a surrender which was defective or void, as in the present case by his not dying within seven years after it, there his customary heirs shall not be bound, but shall take the estate because of the imperfection of the surrender. Just as if a man devises copyhold lands without surrender to a stranger, as the devise is not good, the heir shall take them against the devisee; but if the same deviser took only a trust in the lands, his heir shall be liable to the trust, although the legal estate comes to him. Suppose lands to be surrendered upon trust to a person to do a particular thing, and he neglects to do it, or does it imperfectly, and the legal estate falls to his customary heir, it shall be liable to the trust. But all this depends upon this point, Whether this copyhold land is capable of being settled in the same manner as the *Orchard* estate.

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Therefore this cause must go off until further proof.

Bagshaw against Newton.

Case 105.

In Chancery, 18 October 1743.

THIS BILL was brought for the payment of a legacy left to the plaintiff by his father's will, who died in 1719, the plaintiff at that time very young. It was a specific legacy of the stock in the funds and *South-Sea* annuities, payable at twenty-one.

On a bill brought for a specific legacy, costs decreed out of the other part of testator's personal estate, that the legacy may be entire.

The executor did not appropriate any particular fund for the payment of this legacy, and died, leaving a considerable estate in the funds, which he, by will, had subjected to the payment of his debts.

THE COURT ordered interest to be computed at the rate of five pounds *per cent.* and resolved, that when a specific legacy is claimed in this court, the legatee must have costs decreed him out of the other part of the testator's estate; for otherwise it would be to abridge the specific legacy.

Brizick

Case 106,

Brizick against Manners.

Chancery, Easter Term, 15. Geo. 2.

A on an account stated, owes *B*. 400*l*. *A* agrees to give bond for 100*l*. and to secure the remaining 300*l*. by mortgage. *A* delivers a deed of conveyance to *C*. an attorney, who takes instructions to draw mortgage; but before the bond or mortgage executed *A* dies. Though this agreement by parol be proved, yet on a bill brought against the heir of *A*. the Court refused to carry them into execution.

MR. BRIZICK, the plaintiff, having great dealings with the defendant's late father, in April 1740 they closed their accounts, and a balance of four hundred pounds and odd appeared to be due to the plaintiff. *Mr. Manners*, to secure this debt to the plaintiff, agreed to make a mortgage of his *Paxton* estate for three hundred pounds, to give a bond for one hundred pounds, and to pay the odd money in ready cash. In pursuance of this proposal, *Mr. Manners* delivered a deed of conveyance to *Mr. Conyers* of the *Paxton* estate; and *Mr. Conyers*, being an attorney, took instructions in writing for a mortgage; but *Mr. Manners* dying in a month after, the mortgage-deed was not drawn or executed. The parol agreement for giving the bond for the other one hundred pounds was proved in the cause,

And now this bill was brought by the plaintiff against *Mr. Manners's* heir at law, that his debt, as to the one hundred pounds, might be considered as a bond debt to charge the real estate; and that the defendant, his heir, may be decreed to execute such bond as his father had by parol agreed; and that as to the three hundred pounds, it may be considered as a mortgage upon the *Paxton* estate.

HARDWICKE, *Lord Chancellor*. As to the prayer of the bill in relation to the three hundred pounds, and the having that considered as a mortgage upon the *Paxton* estate, that is a point given up; for what was done by the parties in writing was not done by way of agreement or contract, but only as instructions to an attorney for a further act to be completed afterwards; and it was given, not to be evidence of a contract, but only as an assistant to the attorney's memory, by way of instruction to prepare a deed to be executed; and these instructions were not signed by the party, and all the affair was not executed. If this was to be decreed as the party's agreement, in every case where a man had given loose instructions to draw articles, the party might be brought into this court to decree a performance as of articles themselves: a thing which has never yet been carried so far in this court.

As to the one hundred pounds which is proved, the defendant agreed to give a bond for it, and had given instructions to an attorney to draw it; but upon what penalty, upon what condition, upon what interest, or at what time payable, does not at all appear; and therefore it is impossible for the Court to carry so uncertain an agreement into execution; for it would be at a loss what decree to make.

It has been insisted for the plaintiff, that if a man borrow a sum of money, and promise to give a bond for it, and do not, that an action on the case will lie, and damages may be recovered; and that therefore a bill may be brought for an execution of such a promise

promise in this court ; but I do not know that there ever was such a decree, not even before the statute of Frauds and Perjuries. Thus far the Court, to be sure, would go, that suppose a man intended to lend a sum of money upon bond, and paid it, and the other party then refused to give the bond, this Court would carry such a parol agreement into execution because of the fraud on one party ; but there is no ingredient of fraud in the present case. But at the same time, I will not say off-hand that the Court would not decree the present agreement against the party himself, if it had been more certain ; for as against the party himself, the bond might have been considered as a personal contract, not binding immediately the land itself, but only in its consequences, viz. by recovering judgment upon it, which may be done also upon every simple contract. But this is a bill not against the party himself, but against his heir ; and how does the case stand as to him ? Why, the bill is brought against him in the alternative, either to execute a bond, or to charge the lands with this as with a bond not within the statute of Frauds and Perjuries, which requires agreements to be in writing that affect land ; yet a bond charges an heir ; and upon an action brought against him upon such bond, if he has no land from his ancestor, he may discharge himself by a plea of *riens per discent* ; and if he has lands, he will be charged as to them ; but if I decree him to execute this bond himself, he will be personally liable ; and as to lands of his own purchase, he can by no plea discharge himself therefrom ; and I cannot make a decree that the heir shall bind himself upon this parol contract, though of full age, because it would be putting him in a much worse condition than if his ancestor had executed the bond, because his ancestor's bond could only charge him as having lands by discent ; which I cannot do, because it would be setting up a parol contract to affect lands ; which this Court cannot do, because it would be within the statute of Frauds and Perjuries.

As to the other part of the prayer of the bill, the plaintiff comes directly to affect the lands, for he prays a sale of them upon this parol agreement, which is plainly setting up a parol contract to affect the lands ; and the agreement to such a purpose ought as much to be in writing as an agreement for a sale, mortgage, or any other conveyance of an estate.

But supposing the parol contract to be out of the statute of Frauds and Perjuries, and I had power to decree a specific performance, yet it could not be possibly done for the uncertainty of this agreement, which is always a rule to induce this Court to refuse a specific execution ; for what condition could I name, or what penalty ? Could I now have done this against the ancestor himself ? When must I make the money payable ? and, At what rate of interest ? All this is uncertain. And I do not know whether this man would have bound his heirs ; for an heir is not necessarily bound by the bond of his ancestor, nor ever is, unless he be expressly named ; and I have seen bonds come into this court where
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the heir has been omitted ; and a man may give a specialty without binding his heir. If the bill had been brought against the ancestor, the Court would have decreed the bond in the common form ; but the case is different when a bill is brought against the heir, for nothing can bind him but what creates a lien upon the land, which a parol contract cannot do, because of the statute of Frauds and Perjuries. And it would be a thing of most dangerous consequence to extend agreements by word of mouth in the diffusive manner contended for, *viz.* that what is verbally contracted to be done is as though it was done ; for this would be taking away the conveniencies of the statute, and would throw agreements into the same looseness and uncertainty as was before that act of parliament.

For three reasons then I must dismiss the bill : first, That this parol contract cannot affect the land, and therefore, secondly, not the heir ; and thirdly, this verbal agreement is uncertain in the penalty, time of payment, interest, &c. These are sufficient causes for the Court not to carry this oral agreement into a specific performance.

And his Lordship decreed accordingly.

Case 107.

The Attorney-General against Landerfield.

In Chancery, Michaelmas Term, 17. Geo. 2.

A. devised his real and personal estate to *St. Bartholomew's Hospital* ; and it being doubted whether this devise was within the statute of Mortmain, the governors of the hospital and next of kin came to an agreement, that one-fourth should be paid to the next of kin, the other three-fourths to the hospital ; and this agreement carried into execution.

A. BY WILL devises all his estate both real and personal to the hospitals of *Saint Bartholomew, &c.* and it being a question, Whether this devise was within the late statute of Mortmain ? the governors of the hospitals, &c. and the next of kin came to an agreement, that all the estates, both real and personal, should be sold, and divided into four parts, one of which was to be for the next of kin, and the other three to be paid to the use of the said corporations. The leasehold was four hundred pounds a-year, and the personal four thousand five hundred pounds after debts paid. This agreement came now to be established in chancery. But it not appearing what proportion the leasehold and personal estates bore to the real, the Court was unwilling to decree until the Master should report, whether this agreement was for the benefit of the charity ; for by the writing it appears to be a proposal only, and no agreement. If the latter, the agreement of so great a corporation would have great weight with me ; but these corporations are only trustees for the several charities, and cannot alienate the lands or estates given to those uses. And these estates are distinct from those which they are seised of as mayors, &c. of *London*.

NOTE, This agreement was afterwards established by a decree.

NOTE, In this case the attorney-general argued, that as corporations could not be seised to an use at law, no more could they be trustees, but should have the lands to their own use, divested and freed from the trust. *1. Co. Cheedliegh's Case.*

But

BUT THE CHANCELLOR would not let him go on, nothing being clearer than that corporations might be trustees. Corporations may be trustees.

Levi Gomez against Graham, Philips, and Gold. Case 108.

In Chancery, Easter Term, 15. Geo. 2.

THE DEFENDANT *Graham* being fort-major of *Annapolis Royal*, in *Nova Scotia*, in *America*, with the pay of eight shillings a-day, and being in want of money, borrowed the sum of two hundred and twenty-five pounds of the plaintiff, and made an assignment of his pay to him to answer an annuity of thirty pounds to the plaintiff for *Mr. Graham's* life, by quarterly payments, with a power, however, in *Mr. Graham* to redeem in two years time, upon giving six months notice. The plaintiff shewed this assignment to the defendant *Gold*, who was agent for the payment of all the officers salaries in *Nova Scotia*, who refused to take notice of it, or to pay any part of the annuity. Upon which *Mr. Gomez* brought this bill against *Graham*, *Gold*, and also against *Philips*, who is general or governor of *Nova Scotia*; and the prayer was, to have the annuity paid by the defendants *Philips* and *Gold* out of *Graham's* pay from the time the assignment was shewed to *Gold*, or that *Graham* might pay the two hundred and twenty-five pounds and interest, and be obliged to redeem the annuity.

MR. ORD, WALKER, and MURRAY, for the defendants, argued, that the case of the plaintiff did not deserve any countenance in equity, for the person who assigned his pay is only fort-major of a town in *Nova Scotia*, with a salary of eight shillings a-day only; and if an officer of so small an allowance is to assign his pay, liable to a considerable annuity, he will not be able to keep himself, and to answer the character of his office, which will be prejudicial to the public utility. Besides, he may have made assignments of the same pay, and the agent ought not to keep a book to enter these assignments in, nor to take upon him the office of chancellor, in case there are several assignments of the same pay, to determine which has the priority, and if he pay the money wrong to be liable to a repayment upon that account. In all the great Companies, as the *South-Sea Company*, if a proprietor of stock assign it, or part of it, to another, and the assignee bring his assignment to the proper officer, he takes no notice of such assignment, for they will not load their books with such multiplicity of assignments as might be made. And if in such case the officer pay the stock to the person in whose name it stands, and the assignee bring his bill, if he was to be liable to pay this again to the assignee upon the foot of notice, it would subject the officer to the greatest perils imaginable.

MURRAY, for the defendants, argued, and said, the only question is, Whether the bare hands or instruments to pay public money to soldiers are to take notice of assignments of soldiers pay, so as to be liable

A major of a fort borrows 225l. of B. For securing to B. an annuity of 30l. during A.'s life, assigns over his pay of 8s. a-day, with a power to redeem. B. shews this assignment to C. the pay-agent, who refuses to take notice thereof. Wherefore B. brings his bill against A and C. And decreed, that the pay should be secured to B. but that C. as agent, was not bound to take notice but from the time of the filing the bill, because of the inconveniency. The general and governor of *Nova Scotia*, where the fort lay, was made a party; but bill dismissed as to him.

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liable to a repayment if he refuse to pay to the assignee, and pay to the person who is entitled by his post to receive. In point of law, *choses in action* cannot be assigned; and the assignee could recover them no otherwise against the agent than by suing in the defendant *Graham's* name; and in assignments of *choses in action*; there is generally a covenant to sue in the assignor's name; that this Court relieves assignees of *choses in action* only in particular circumstances (a), for there must not be only a valuable consideration, but also no mixture of fraud; and if any inconvenience arise in the relieving against the rule of common law, this Court will not do it, and here in relief to the plaintiff the public utility would be damaged, as is shewed above. He then cited the case where the great Companies will not take notice of assignments of stocks. That if an officer has a right to assign his pay, every common soldier has a right to do the same; and it would be endless for a paymaster to enter all assignments, and to be liable to repayment if he did not pay the assignees: That this annuity was an anticipation of the officer's pay, for it is an annuity chargeable on the salary for the life of the officer; and if every common soldier could make such lasting charges on his pay *before it accrued due*, he must starve, and be quite disabled to fulfil his duty; or to answer the demands of his country: That by the custom of the army, the agent is not obliged, nor ought, to pay any salary but to the soldier himself: That by the late act of parliament of Mutiny and Desertion it is enacted, "That if any agent, paymaster, or clerk, do wilfully detain any soldier's pay for the space of one month after it become due, he shall forfeit his office, be incapable of holding any other, and pay one hundred pounds." That the paying these assignments to strangers, and not to the soldier, may perhaps be construed to be a wilful detaining: That this bill, especially as to *Mr. Philips*, ought to be dismissed with costs, for he is general and governor of *Nova Scotia*; but receives no public money, nor pays any; that although he names the agent, yet it is not as deputy, but names him merely as an officer having power to name other subordinate officers.

HARDWICKE, Lord Chancellor. As to *Mr. Philips*, who is general and governor of *Nova Scotia*, there was no ground to make him a defendant to this bill; for it is not pretended that the pay comes to his hands; it is issued through the hands of the paymaster-general to the agent; and the Legislature, in the statute of Mutiny and Desertion, which directs the pay of soldiers, takes notice of the paymaster, agent, or clerk, in express words; but there is no notice at all of the general or governor. In cases of this kind, it would be very mischievous if bills were to be entertained against generals of regiments upon assignments made of the pay of any officer, and that they shall be affected by notice when there is not any proof of notice, and not pretended that any pay

(a) 1. Term Rep. 26. 619.

goes through their hands. Therefore the bill as to him must be dismissed with costs.

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As to the defendants *Graham*, and *Gold*, the agent, there have been several objections made, and principally upon the consideration of public utility. It has been said, that these sorts of assignments ought to be void; but this is a defence which comes much better from the mouth of *Gold* than *Graham*, who granted the assignment, and received a valuable price for it. This objection undoubtedly deserves to be considered. I wish practices of this kind were to be avoided; for there may be many inconveniencies arising to the public by granting anticipations of pay before it is due, or making annuities out of it, especially by lesser officers, where their pay is scarcely a maintenance, and thereby disabling them from serving their country. Yet it is very difficult to tell in what place to draw the line to restrain these assignments; for as there are, on one hand, great inconveniencies, so, on the other, such assignments have their advantages. For where an officer has a family, he may not be able to maintain it without such assignments; or some other kind of draughts upon the agent; for they may want personal credit; and in cases where an officer may want a pretty large sum for public occasions, as to buy himself tents and beds to incamp abroad, he may not be able to buy without these sorts of securities upon his pay. If I should restrain these assignments generally, I should only make a monopoly of these sorts of securities to agents; and upon such a decree, consequences of a worse kind would arise than where such assignments are made upon good and full consideration: therefore I shall be very cautious in laying down any such rule. I wish any evidence had been given, that it is the custom of the army that such assignments are not good, and that the agents never take any notice of them, or pay them; for certainly these assignments are not restrained by anything in the Mutiny and Desertion Bill; for the agent there, if he wilfully detains any pay for one month after it shall be due, is subjected to very hard penalties; but his paying these assignments to the assignees, and not to the soldier himself, is no wilful detainer, for the soldier by his deed has consented that the pay shall be withheld from him, and paid to a third person.

As to the practice of the army there is no proof, but I believe both in THE FLEET and THE ARMY, that it is the custom every day to do the same thing. Tickets of seamen, and letters of attorney to receive sailors pay in the fleet, were in daily use until a late act of parliament to restrain such sailors tickets; and this statute is evidence of the general custom before. And if the Legislature sees the same inconveniencies arise from the assignments of soldiers pay, they will restrain it; and it is not for this Court to do it against the universal practice, where such assignments are made upon valuable consideration, and without fraud. Suppose an officer wants money, and borrows it of his friend, and draws a bill upon the agent to pay to *Mr. A.* or order, so much out of his growing subsistence:

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these bills have been common, and upon the acceptance of the agent several actions have been brought upon the custom of merchants in the king's bench; and the question has been, Whether such draughts have been bills of exchange? And they have been held not to be so (a): so also to pay out of growing rents are not bills of exchange; for it is uncertain, from the accidents of bad tenants and the *quantum* of the rent, when it will answer the draught. But though such notes are not bills of exchange, yet if they are accepted, the party, by changing his action, has a remedy against the acceptor, though he cannot declare upon the custom of merchants. And if the party has a remedy upon the agent's acceptance of these bills, why is he to be remediless upon an assignment, which is as good a conveyance of the property as a bill accepted? If these assignments were to be disallowed, officers, in many cases, would not be able to live. To lay down a rule against them where there is no fraud, would be laying down a restraint against a general practice; and if the inconvenience is very great of these assignments, the Legislature will prohibit them, as it has done seamen's wages. If there had been any proof of fraud in the transaction, or any special inconvenience attending this single case, or that it was against the practice, it should have had its weight. Therefore upon the whole, I am of opinion, that this assignment of pay to secure an annuity is good, and that it is not to be set aside.

Another question arises in relation to the defendant *Gold*, How far he is to be affected by notice of this assignment? It is proved, that this assignment was brought to *Gold*, the agent, who said he would have nothing to do with it. And the plaintiff now insists, that as this notice affects the agent, he ought to have stopped the pay, and ought from that time to be considered as a trustee for the annuitant *pro tanto*; and that if he pay the whole salary to *Graham*, he pays it in his own wrong, and ought to repay it to the annuitant and assignee. The Counsel for the defendant *Gold* insists, on the other hand, that *Gold* might refuse paying or taking notice of this assignment; that the public Companies, as *the Bank*, the *East-India Company*, and *South-Sea Company*, will not accept of assignments of stock, or parts of stock, or bills drawn upon them by people who have stock, for it would be inconvenient to load the public books with such multiplicity of matter, for a man might draw a hundred bills for one hundred pounds; and therefore they will pay no money but upon transfer. And I shall be cautious in obliging agents to take notice of these assignments; for there may be several assignments of the same pay: and I would not put agents to the difficulty of determining the priority of such assignments; for if an agent determine wrong, he would be liable to an account and repayment to the proper person intitled. And therefore I do declare, that *Gold*, the agent, is not to be affected by this kind of notice. Suppose an officer draw a note on the agent, in the form of a bill

(a) *Josseline v. Laffere*, 10. Mod. 294. 316.

of exchange, to pay so much to *A. B.* or order out of his growing subsistence, and the agent refuse to accept it, will any court of law or equity say he is obliged to stop the pay in his hands? It would be very mischievous to make public paymasters take notice of such assignments. Therefore he is not to be affected upon the head of notice in the present case until his being served with a *subpœna* of the bill, or until his own answer.

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And his Lordship decreed *THE MASTER* to take an account of what became due to the defendant *Graham* from the defendant *Gold* for his pay from the time of the putting in the answer of the defendant *Gold*: And let the defendant *Gold* pay to the plaintiff so much as shall be found due to him for his arrears of the said annuity out of what shall be found to have become due to the defendant *Graham* for his pay on the account before directed; and let the defendant *Gold* continue to pay to the plaintiff the growing payments of the said annuities of thirty pounds a-year, quarterly, out of the pay of the defendant *Graham*, as far as shall come to his hands, as long as the defendant *Graham* shall be entitled to such pay; and the annuity shall continue, and in case the defendant *Graham* shall be minded to redeem this annuity, pursuant to the clause in the assignment for that purpose, let him be at liberty to apply to the Court for directions touching such redemption; and let the bill be dismissed as against the defendant *Philips, &c.*

His Lordship said, it had been determined in this court upon great consideration, that an officer's pay might be seized upon a sequestration (*a*).

(*a*) On the authority of this case it was decided in the court of common pleas, that although an officer's half-pay is not assignable at law, yet the use of it may be assigned in equity, and that when so assigned, the assignor cannot maintain an *assumpsit* for it as money had and received to his use, *Stuart v. Tucker*, 2. Bl. Rep. 1137. But in the matter of *Kennedy*, a bankrupt, it was held, in December 1788, that an officer's half-pay is not assignable, *Cook's B. L.* 355. *notis.* *S. P. Cathcart v. Blackwood*, in the House of Lords, 26 February 1765. In the case of *Flarty v. Odum* it was decided, that the half-pay of an officer is not the subject

of sale; and therefore, that creditors cannot compel him to include it in his schedule under the Lords Act, 3. Term Rep. 681. Nor is the full-pay of an officer assignable, *Barwicke v. Reade*, 1. H. Bl. Rep. 627. And it makes no difference whether such full or half pay be actually due and receivable at the time of the assignment or not, *Lidderdale v. Montrose*, 4. Term Rep. 248.—It has been held also, that the king may at any time stop the pay of an officer in the army, by signifying his pleasure that it shall be no longer paid, *Macdonald v. Steele*, Sittings after Hilary Term, 33. *Geo.* 3. *Peake's N. P.* 175.

Case 109.

Rogers against Downs and Others.

In Chancery, Easter Term, 15. Geo. 2. 1742.

A. devises his freehold and copyhold lands in the county of *Suffex*, made his will in 1736, whereby he devised both freehold and copyhold lands, there being a previous surrender to E. C. and D. and their assigns, until E. Rogers, attain their several and respective ages of twenty-one years, upon trust, that the said *Downes*, *Barnard*, and *Aylmere*, and *Bonny* and *Rogers* until they should attain their ages of twenty-one years, in trust, that they should receive the rents and profits for the maintenance of E. and F. until they should attain their ages of twenty-one; and then he devised both freehold and copyhold lands to *Bonny* and *Rogers* for life, without impeachment of waste; and from and after their decease, for the use and behoof of their heirs as tenants in common, and not as joint-tenants."

After this, the testator *Adam Churcher* died. *Thomas Bonny* arrived to his age of twenty-one, whereby the lands vested in him; and being seised of the moiety of both freehold and copyhold, by lease and release, in 1742, between himself of the one part and his sister *Martha Bonny*, since married to the plaintiff *Rogers*, on the other part, granted to the plaintiff *Martha Rogers* and her heirs "all the moiety of his lands, farms, tenements;" and then also made his will, and gave her all his personal estate, and made her his executrix.

This bill was brought in order to have an account of the rents and profits of both freehold and copyhold, and that she may have a moiety of those which have accrued since *Bonny's* death; that her testimony may be perpetuated; that there may be a partition of the freehold and copyhold estates; and that one moiety may be decreed to her and her heirs; and she offers to secure an annuity which is chargeable on the estates.

MR CHUTE, MR. NOEL, and MR. WILBRAHAM, for the plaintiff. The question, they said, was, Whether this devise to *Bonny* and *Rogers* was a joint estate for their lives, with a fee-simple in remainder to them as tenants in common? or, Whether it was not an immediate fee-simple in them as tenants in common? If it was the first, the defendant *Rogers* would be entitled to the whole estate by survivorship; if the last, the plaintiff had brought her bill very properly to have a moiety of the rents and profits since *Bonny's* death, and to have an immediate moiety of the fee-simple by partition.

an estate in jointure cannot sink into a fee of a different nature: and held, that the common-law conveyance did not sever the jointure of the copyhold, as it would have done if the same had been made by a jointenant of a trust only, because no surrender could in such case be made.—S. C. 2. Atk.

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They argued, that as the estate is limited to the ancestors for life, with an immediate devise to their heirs, their heirs cannot, by this devise, be purchasers, for they are to be considered as totally in their ancestors, and must take by descent; that the estate for life intended to pass is a mere nullity, and must merge in the inheritance, there being no intermediate estate to support the estate for life, and to keep it distinct from the inheritance; that supposing this devise to be a joint estate for life and tenancy in common in remainder, and so the plaintiff *prima facie* not entitled to anything until after the death of *Rogers* the survivor, yet the deed of lease and release, by *Bonny* to the plaintiff *Martha*, is a severance of the jointenancy; that as to the severance of the freehold estate there can be no doubt; and the only dispute can be, whether the jointenancy of a copyhold estate can be severed by a lease and release, which is a common-law conveyance. They said, there was no case in point where it is said that there must necessarily be a surrender to sever the jointure of a legal estate of a copyhold; that a lease and release is certainly a manifestation of *Mr. Bonny's* intention; and as it is for the benefit of his sister and heir, it shall be deemed a sufficient severance without a surrender; that if a lease and release will not sever the jointure of the legal estate of a copyhold, yet it will sever the jointure (a) of the trust of a copyhold; that this present devise is an equitable or *cestui que trust* estate in *Bonny* and *Rogers*, which may be conveyed without surrender; and that the legal estate of freehold was in *Downes*, *Barnard*, and *Aylmere*, until *Bonny* and *Rogers* should attain their several ages of twenty-one.

MR. ATTORNEY-GENERAL and MR. HOSKYNs, for the defendants, argued, that this devise was a joint estate in *Bonny* and *Rogers* for their lives, with a remainder in fee to their heirs as tenants in common; and to prove this they cited the case of *Barker v. Gyles* (b), and *Tuckerman v. Jefferies* (c); that in the present will there seemed to be two distinct and consistent devises; for the testator by the first devise gives the estate to *Rogers* and *Bonny* for life, without impeachment of waste, which is a joint estate; and then goes on and makes a second devise, as though to a third person, and gives the fee to the heirs of *Rogers* and *Bonny*, as tenants in common; that in this case the estate for life, as it is joint, does not sink into the remainder, which is a tenancy in common; and if an estate be made to two, and to the heirs of one of them, they are jointenants for life, with a sole fee-simple in remainder to one of them; that it must be admitted that the lease and release, as to the freehold, is a severance of the jointure, but it is no severance of the copyhold, for two reasons. The first is, that the lease and release does not in effect extend to or include the copyhold, for it is of lands generally; and upon the face of it it does not appear that there is any express mention of the copyhold; and if the word "copyhold" is omitted, it cannot be intended to take the copyhold estate in; for if a man has both copy-

(a) Ante, 45. Gibbon v. Styles.

(c) 11. Mod. 108.

(b) 2. Peer. Wms. 280.

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hold and freehold estates in the same parish, and he devises all his lands generally in that parish, the copyholds will not pass. The second is, that a lease and release, being a common-law conveyance, and adapted to freehold estates, was never of any consideration to affect a copyhold, either to convey or sever a jointure of it. But it is objected, that *Bonny* and *Rogers* had only an equitable interest in the copyhold, which is barrable by lease and release, or any other common-law conveyance; and that the legal estate and freehold was in the trustees, and therefore no occasion for a surrender. But that is a mistake; for the legal estate is not in the trustees, for they have no estate of inheritance or freehold, it being only given to them and their assigns until *Bonny* and *Rogers* attained their ages of twenty-one, which is only a chattel interest for years, and no estate for life or freehold; and therefore the freehold is in the jointenants *Bonny* and *Rogers*; and two jointenants of a copyhold can neither sever, sell, or do any act without a surrender, unless it be to make a lease for a year, according to the general custom of all manors.

HARDWICKE, Lord Chancellor. There have been two general questions made in this case.

The first, Whether, by the words of this will, there is a devise to *Rogers* and *Bonny* for life as jointenants, with a remainder in fee as tenants in common? or, Whether it is not an immediate estate in fee to them as tenants in common?

The last, Supposing it to be a joint estate for life in them, whether, by force of the deed executed by *Bonny* before his death, there has been a severance of that jointure?

Here are two sets of devises; the first to *Downs, Aylmere, and Barnard*, the trustees. And a question arises, upon what estate they took. AND I AM OF OPINION, that they took nothing in the inheritance or freehold, but only a chattel interest to them and their assigns until *Rogers* and *Bonny* attained their several ages of twenty-one years; and this chattel interest was to continue until the youngest of them, or if one died until the survivor, attained his twenty-first year, before it determined. The trust upon which it is given is to receive the rents, issues, and profits, to the use and behoof, and to the support and maintenance of *Bonny* and *Rogers* until they are twenty-one. And as this chattel interest in the trustees is to continue until the younger of *Rogers* and *Bonny* is twenty-one, I am of opinion, that if one of them die the profits will go to the survivor, if he is under twenty-one, for so long the trustees will have a right to receive. This being the construction of the first clause and the trust, it will throw a great light upon the subsequent devise to *Rogers* and *Bonny*, which is the second devise.

As to the second clause, it is a devise of the remainder of a legal estate, and not a devise of a trust; for there was no freehold in the trustees, but only a chattel interest. That being so, the devise

is to them for their natural lives without impeachment of waste; and after their *deceases*, then to their heirs as tenants in common, and not as jointenants. What was the intent of the testator in this? It was to have made *Rogers* and *Bonny* tenants for life; and therefore he adds the words "*without impeachment of waste*:" and "*after their deceases*" gives the estate to their heirs. And if this intent could have been supported, then *Bonny* and *Rogers* would have been jointenants for life without doubt; and as it is from and after their *deceases* that the heirs are to take in the devise over, it is plain they cannot take until after the decease of the survivor, which makes the jointure very plain, and brings it near to the case of *Tuckerman v. Jefferies*, whereby the testator gave and devised his estate to his two nieces *Elizabeth* and *Jane*, *equally to be divided*; and after the death of both of them, then to the heirs of *Jane*; and determined to be a joint estate for life, notwithstanding the words "*equally to be divided*;" for as the heirs of *Jane* were not to take until after the death of both of them, which must be after the death of the survivor, it must of necessity make a joint estate; which is the case here; for the heirs are not to take until after the deceases of *Bonny* and *Rogers*, which must be of the survivor of them.

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Rep. Q. A. 108.
Holt, 370.

But the rule in law in *Shelly's Case*, which has been held for good law ever since, is, that where there is an estate to an ancestor for life, and afterwards in the same deed there is an estate limited to the heirs of the same ancestor mediately or immediately, the inheritance vests in him, and the heir cannot be a purchaser. If so, this estate for life, it is insisted, sinks into the inheritance, there being no mesne estate to keep them distinct and independant; and that therefore the intent of the party to give an estate for life to the two ancestors is overcome by the rule of law. And though this may be true where an estate is limited to a man solely for his life, without impeachment of waste, and after his decease then to his heirs, yet a man may make two persons jointenants for life, with a remainder immediately to their heirs as tenants in common, without the estate for life's being merged in the fee; for an estate for life in jointure cannot sink into a fee of different nature and quality as a tenancy in common is. And this is agreeable to the resolution in the case of *Barker v. Gyles* (a), which was thus: One devises lands to *Ferome* and *Robert Barker*, and the survivor of them, and their heirs, equally to be divided between them, share and share alike; wherefore LORD CHANCELLOR KING, it being the first cause which came before him, decreed, that the first part of the devise being to two and the survivor of them, makes them plainly jointenants for life; and that as to the next words, "*and to their heirs, equally to be divided between them, share and share alike*," they are plainly words importing a tenancy in common, and shall operate accordingly, so as to make them tenants in common of the inheritance; wherefore he held the two co-devisees

(a) 2. Peer. Wms. 280.

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to be jointenants for life, with several inheritances to them in common. And this decree was affirmed upon an appeal to the House of Lords. And this is agreeable to the aforesaid case of *Tuckerman v. Jefferies*. As to the case of *Blisset v. Cranwell* (a), it is different from the present case: the words there are, "I give and bequeath to my sons *Richard* and *Robert*, and their heirs for ever, and the longer liver of them, to be equally divided between them, after my wife's death, all that my messuage, &c.;" and held, that the two brothers were made tenants in common in this will; for there they rejected the words "the longer liver of them; which makes the case quite different from the present. There is another strong reason which governs this case upon the first clause. AND AS I AM OF OPINION, that by the first clause, "during the continuance of the trust," which is until the younger or the survivor is twenty-one, the whole profits would go and survive to the benefit and support of the survivor until twenty-one, it would be inconsistent to suppose, if one died, and the other should have the whole until twenty-one, that after he attained that age it should go to the heir of that person. As to the second general question, Whether the lease and release of *Bonny* has severed the jointure of the copyhold estate? there is no doubt but it is a severance of the jointure of the freehold estate, but I do not see how it can sever the jointure of the copyhold estate, which can only be severed or operated upon by surrender. If this joint estate had been only a trust to *Rogers* and *Bonny*, I should have gone a great way to have decreed a severance of the jointure; for between volunteers, any declaration or appointment in writing whatsoever would have severed the jointure of the trust of a copyhold. But besides, this lease and release is imperfect in expression, and does not mention the copyhold estate; so that if it had been a trust, equity could not have extended this deed to have included the copyhold estate. And therefore as a lease and release is a common-law charter, and will not pass or sever the legal estate of a copyhold; and as the deed is imperfect, so as it would not sever the jointure of the trust of a copyhold; therefore I am of opinion, that the jointure of the copyhold estate is not severed. I therefore decree, that the plaintiff *Rogers*, in right of *Martha* his wife, and *Martha* the wife, by virtue of the deeds of lease and release, are entitled to one moiety of the freehold estate devised by the will of the said *Adam Churcher* to *John Rogers* and *Thomas Bonny*; and let it be referred to the Master to take an account of the rents and profits of the said freehold estate accrued since the death of the said *Thomas Bonny*, which have been received by the trustees or their order, or by any person for their use; and let one moiety of what shall be coming upon the said account be paid to the plaintiffs; and let the said freehold estate be equally divided between the plaintiffs and the defendant *John Rogers*; and let a commission issue for that purpose, and take the usual directions for issuing such commission; and let one moiety of the

(a) 3. Lev. 373.

said estate be allotted to the plaintiff, and the other moiety to the defendant *John Rogers*; and let them execute conveyances of their respective moieties; and let the Master settle the conveyances, lest the parties should differ about the same, &c. &c.

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Jackson against Butler and Spring (a).

Case 110.

In Chancery, Easter Term, 15. Geo. 2. 1742.

THIS was a bill by the plaintiff in order to have one deed of mortgage delivered to her which the defendant *Butler* got out of her hands as her attorney to get her the money upon it, and which he had pawned to the defendant *Spring* for one hundred pounds; and also to have a note of five hundred pounds delivered up to her, or to have an injunction upon it to stay all proceedings, upon a suggestion that it was a *forged note*, and wrote upon a vacant part which was over her name in a letter,

The plaintiff *Elizabeth* was entitled by devise to the real and personal estate of her uncle *Mr. Lownds*. The defendant *Butler* insinuated himself into her company, and offered to get in the debts of the testator *Mr. Lownds*; upon which she delivered to him a mortgage for four hundred pounds due to her uncle *Mr. Lownds* from one *Mr. Richardson*. The plaintiff pawned this deed for one hundred pounds to *Mr. Spring*, and at the same time gave him his own note for one hundred pounds, upon payment of which the mortgage-deed from *Mr. Richardson* to *Mr. Lownds* was to be re-delivered.

MR. BROWN and MR. MURRAY for the plaintiff.

CHUTE and CAPUR for the defendants.

HARDWICKE, Lord Chancellor. As to *Butler* the case is very clear. It appears he was entrusted by the plaintiff with this deed to receive the principal and interest from the mortgagor, and he has thought fit to pawn it to *Spring* without any authority. *Butler* has also insisted upon a note due from the plaintiff to him for five hundred pounds. The plaintiff says it is forged. The defendant has made no proof of the consideration of the note, and has given very different representations of that note; and he does not pretend in his answer that anything is due upon the note, but says it is lost; and therefore there must be a direction for an injunction to stay all actions upon that note, and to restrain *Butler* from assigning it to other persons; and I will order him to be examined upon interrogatories as to the custody of that note, and if he has it, that it may be given up.

As to *Spring*, he insists, that this mortgage from *Richardson* to *Lownds*, belonging to the plaintiff, was in the custody of *Butler*, and was pledged from *Butler* to him upon the loan of one hundred

A. gives B. a mortgage to receive the money due upon it. B. pawns it, and A. brings his bill: and held a proper remedy; though urged, that an action of trover would lie, as in the case of plate pawned by a servant. It seems, that a defendant is obliged to discover and deliver up a note, though forged.

S. C. 2. Atk.
306.
Eq. Cas. Abr.
129. 167. 310.

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pounds, as a security. And the question as to him will be, Whether he can retain his deed against the plaintiff until the payment of the one hundred pounds? AND I AM OF OPINION he cannot. That the plaintiff was in possession of this deed; and had the sole property in this deed at first, is plain; and that *Butler* acquired no property by the manner the plaintiff delivered it to him, is as plain; and if he had no property, it is undoubtedly true that he could transfer none to *Spring*. And if I should permit *Spring* to retain this deed for one hundred pounds, I should lay down the most dangerous rule for the unsettling of property which can be imagined; for the deed being left with *Butler* to receive the money, he does not so much as gain a special property, but has no more than a bare custody; and if he had a right to pawn this deed, and the pawnee a right to retain until payment, it would be highly mischievous; and it might as well be said, that a gentleman's butler, who has the bare custody of his master's plate, and of which he may now commit felony, might pawn them, and retain them against the master until payment: but it is clear and settled, that the pawnee in such case gains no property, and the master, upon an action of *trover*, will recover against him without paying him anything. And if it is so in the case of plate, much stronger in the case of deeds; for a man may possibly impose upon another in plate, because there is often neither arms nor name to discover in whom the property is, but deeds have always such characters upon them as will point out the owner. And it appears upon the face of the deed, and also from the note which *Butler* gave to *Spring*, that it was a mortgage from *Richardson* to *Lownds*, to which *Butler prima facie* had no title. Neither did *Butler* enquire, whether he had any title to it, or any authority to pawn; and therefore he must answer for his indiscretion. And if a man might retain a deed against the proprietor without enquiring into the title of the pawnee and his authority, a person who had stolen or come unfairly by it, or an attorney or solicitor, who indeed have a property to detain a deed until payment of their bills, or their clerks or servants, or indeed any person who had but the custody of a deed, might pawn it, to the prejudice of the owner; which is inconvenient and absurd.

It has been urged at the Bar, that an action would lie; and that if there was a remedy at common law, the plaintiff ought not to come here. Supposing the plaintiff was to bring *trover*, he could only recover damages, which is a very inadequate remedy; for it is impossible to tell what damages a person may suffer by the having deeds perpetually kept from him; and the proper remedy is in this court, which will decree a re-delivery of the very deeds. And in this court, if it appears that the defendant had such title to the deeds as will defend him in an action of *trover* at law, or has a title subject to redemption in the plaintiff, it might fetter them to a court of law. But neither of these is the present case; for as the defendant *Spring* acquired no property upon the pawn, he can have no defence at law.

Wilkinson

Wilkinson *against* Sterne.

Case 111.

In Chancery, 5 December, 1743.

HARDWICKE, *Lord Chancellor*. A creditor on security, and at the same time a tenant of an estate, shall not be obliged, unless there is a particular agreement to that purpose, to take his debt by dribblets; *id est*, to take the overplus of the rent in his hands in part of payment to reduce the principal after deduction of the interest due on his debt.

A creditor-tenant not obliged, without special agreement, to take his debt by dribblets.

Williams *against* Williams.

Case 112.

In Chancery, Easter Term, 15. Geo. 2.

ONE *Griffith Williams* made his will, and devised all his lands to his son *William Williams*, and his heirs, upon the conditions therein and thereafter mentioned, *videlicet*, "to pay all my just debts, and to live with my wife and children for five years." The testator then goes on devising part of his personalty to his son and the other part to his wife; and then he goes on and directs, "that his son *William* pay to his daughter *Elizabeth* the sum of one hundred pounds at the end of five years; to his daughter *Jane* the sum of eighty pounds at the end of seven; and his son *John* the sum of sixty pounds at the end of ten years;" and of this will makes his wife *Margaret* and son *William* executors.

A. gave his real estate to B. and his personal to B. and C. his executors, who proved the will, and acted. B. dies; and a bill is brought for a legacy charged upon the real and personal estate. It is not sufficient to make the surviving executor and B.'s heir at law parties, but B.'s executor likewise; because B.'s heir is interested in the discovery of personal estate, since that is to be first applied. And it seems to be a rule, that where a defendant is interested in the having another made a defendant, the plaintiff must make such a defendant; but where the plaintiff only is affected, he may or may not make such party a defendant, at his pleasure.

This will was proved by both *Margaret* and *William*; but *William* intermeddled most with the personal estate; and then died, making an executor.

This bill was brought by *Elizabeth*, *Jane*, and *John Williams*, children of the said *Griffith* the testator, in order to have a satisfaction for their legacies, in the first place, out of the personal estate, and if that is deficient out of the real estate. To this bill they have only made *Margaret*, the surviving executor of *Griffith*, a defendant, and have not the representative of *William* before the Court, but only his heir at law.

And it was objected, that as the bill prays an account of the personal estate of *Griffith* the testator, not only his surviving executor, but also the representative of the deceased one, ought to be before the Court; and that there was a defect of parties.

HARDWICKE, *Lord Chancellor*. Where a plaintiff is only concerned in interest, there he may waive such demand, and omit making the party a defendant to his bill. But here the defendants themselves are interested in the having *William's* executor before the Court; for it is brought by the legatees to have payment, in the first place, out of the personal estate, and if that is deficient to charge the real estate; and for that purpose they have made the heirs at law parties. Now the heirs at law have an interest in

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having *William's* executor before the Court, that there may be a complete account of the personal estate; and to have that applied, in the first place, in discharge and ease of the inheritance. Therefore I am of opinion, if the personal and real estate are liable, as the case is opened to me, that there is a defect of parties.

MR. WILBRAHAM. As the surviving executor is made party, it is sufficient; for he may be chargeable with the whole personal estate, and have a remedy by bill against the representative of the deceased executor for what came to his hands.

HARDWICKE, *Lord Chancellor*. There are cases where the making a surviving executor only defendant will be sufficient; but where you want parties before the Court to have a complete account, there you must have all the executors, or the representatives of every executor before the Court, for each executor may possess some distinct part of the personal estate, though you are not obliged to pursue the personal estate into the hands of strangers, and to make them defendants. Suppose there are two executors, and both have administered; as they may each of them by law get in distinct parts of the personal estate, and as each of them is answerable only for such part as comes to his hands, if one die, it is necessary that his representative be made a party to the account. Therefore there is a defect of parties.

MR. BROWN and MR. ROBINSON then insisted, that the personal estate in this case is not liable to these legacies, but only the real estate in the hands of *William Williams*; and then, as we have his heir before the Court, we have proper parties, and the prayer of the bill, as to the account of the personal estate, must be dismissed.

MR. ATTORNEY-GENERAL and MR. WILBRAHAM and MR. WELDON to the contrary. It is insisted, that these legacies devised to the plaintiffs are not to come out of the personal estate, and that for several reasons: as, that there is no express charge upon the personal estate; that they are not bequeathed by the general name of legacies; that the personal estate was not intended to be charged, because it is specifically devised away, part to the son, and a part to the mother. But then the plaintiffs must prove, that this is chargeable on the real estate; and in order to this they say, that this is payable by the devisee of the real estate, and that the real estate was devised upon condition to pay these fortunes; but it is not so, for the condition is to pay his debts, and to live with his wife for five years, &c. And as there are no express words to charge the real estate, it ought not to be charged by implication.

HARDWICKE, *Lord Chancellor*. In the present case, there is no doubt but that, in one degree or other, the real estate is chargeable either, in the first place, in the hands of the devisee of the real estate, *William Williams*; or, secondly, in his hands in case the personalty should be defective. The plaintiff insists, the
real

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real estate is liable: *The defendant*, that the personal estate given to the son is liable, and that the real estate is only subject in default of personalty. AND I AM OF OPINION, that part of the personal estate given to the mother is not liable; for these fortunes to the plaintiffs are not given as general legacies, but only as *William* the son is devisee of the real estate. But suppose both the real and personal estate in the hands of the son had been liable, but not the personal estate devised to the mother; and suppose the son living, could he upon this bill have insisted, that there should be first an account of the personal estate? No; for it would be a vain thing, as he has both funds in him; and it is not material out of which fund the money is paid, whether real or personal estate. Indeed, where two persons are entitled, one to the personal estate, and the other to the real; or if there had been devisee for life, remainder in tail, the Court could not do justice to the person who has the real estate in the first case, nor to the remainder-man in the second, without an account of the personal estate in the first place in ease and relief of the real estate.

Here appears a plain intention to charge the fund of the real estate only; for he gives his lands to his son *William* in fee, upon the conditions therein and thereafter mentioned, *videlicet*, "that he pay my debts, and live with my wife and children for five years." After this, these following several bequests of the personal estate specifically: Such and such things, by name, to the son, and such and such things to his wife: and then there follows a direction, that the son *William* pay a hundred pounds to one child, eighty pounds to another, and sixty pounds to another, payable however at distant times. It is insisted for the defendants, that the conditions annexed to the devise must be taken to be those only which immediately follow it. BUT I AM OF A DIFFERENT OPINION, for the whole of a will must be taken together; and all a man's directions cannot be given together, but must be successive, and follow one another; and if a man put his thoughts and directions in an improper order and succession, yet the Court will marshal them; and in this case the directions to pay the fortunes to the children are part of the terms upon which he has given the real estate to the son, notwithstanding they are separated from one another by the intervening bequest of the personal estate.

And this construction, that the real estate is chargeable, is so fortified upon the times of payment, some being at the end of five, some at seven, and others at ten years. This was to give time to *William* to pay them out of a fund which was continually producing something by annual profits.

And therefore as to the parties you may go on,

Bel

Case 113.

Bell against Howard and Others (a).

In Chancery, Easter Term, 15. Geo. 2.

If a father who is possessed of an advowson, which he apparently designed for his son, be prevailed on, when in an infirm state of mind, to enter into articles for the sale of it to another person, a court of equity will not compel a specific performance, although there is no imposition or fraud imputable to the purchaser.

HARDWICKE, Lord Chancellor. This is a bill brought by *Mr. Bell* to have a specific performance of articles for the sale of an advowson, brought particularly against *Mr. Howard*, the eldest son and heir at law of *Mr. Charles Francis Howard*, who entered into the articles.

But there are so many objections against decreeing a specific execution of them, that if ever there was a case for the Court to exercise its discretion in refusing to decree a performance, and in leaving the party to his remedy at law, these are surely one of those cases. I do not mean as to any unfair practices in *Mr. Bell* the plaintiff, for there is no imposition or fraud charged upon him. But in relation to the circumstances in which *Mr. Howard* entered into these articles, this Court cannot decree a specific performance; and if the case be considered upon all the parts of it, viz. the terms of the articles, the circumstances and condition the seller was in, and the manner of making him execute them, the decree will be very plain.

2. Vezey, 155.
1. Bro. C.C. 95.

As to the circumstances: Here a gentleman of a good family, but small estate, has a great many children, I think five, greatly in debt, and of broken circumstances, after having lived twenty years with his wife, is prevailed upon by *Mrs. Norton* his servant, and who is one of the defendants, to turn his children out of doors, and to live with this woman, who had the absolute command of his person and property. After he was in these circumstances, it is clear, by all the witnesses, that he habituated himself to drinking to an excessive degree, by which he impaired his senses and constitution; and the witnesses spoke to the natural account of what was the occasion of that drinking, that he did it to drive away reflections which he could not bear. In these circumstances, he is very near his end at the time these articles were executed, for they are executed on the seventeenth of February 1735, and upon the nineteenth in the morning he dies. It was mentioned at first as though he was insane or *non compos*; but I do not consider him to have been in that state which the law calls *non compos*, but he was, to be sure, very weak, and liable to be imposed upon, especially by this woman, who had an influence over him. It appears, that during his best state of mind, and in his sober intervals, he had an intention to preserve this advowson for his son, which was a very prudent thing; for as his fortune was so much incumbered, he could not do a more beneficial thing for his son than to give him a living of about two hundred pounds or three hundred pounds a-year.

(a) In the original manuscript from which these Cases were taken, it is said, in the margin of this case, "See my Eq. Abr. 16. 19. 333." And for the supposed author of this Abridgment, see 21. Viner. Abr. 489. *notis.* 5. Viner. Abr. 408. *notis.*

It appears, that he had often drank his son's health by the name of the young Parson of *Elfdon*.

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Under this state of health and mind (a) it is that *Mr. Howard* intends to sell this advowson; and how is this brought about? *Mr. Dawson*, who is a bailiff or serjeant at mace, and keeps an alehouse at *Newcastle*, comes to hunt with *Mr. Howard*, and it is of him *Mr. Howard* desires a purchaser may be found out. *Mr. Dawson* looks out, but does not get one till *February 17, 1735*, and then there comes a letter from *Mrs. Norton*, and not from *Mr. Howard*, wherein she says, the price is fixed at eight hundred pounds, and hopes his friend is in earnest. She says, *Mr. Howard* had taken physick, or would have wrote himself. *Mr. Dawson* then sets further to work, and makes the proposal to the plaintiff, who accepts it on the terms of eight hundred pounds; and then articles are prepared without consulting *Mr. Howard*, and executed by *Mr. Bell* first, without carrying them first to *Mr. Howard*. The articles are brought to *Mr. Howard* late at night; and when they were produced he seemed satisfied, and owned the letter wrote by *Mrs. Norton* by his command; but it is proved by *Mr. Howard's* daughter, who was about seventeen years of age at the time of the execution, and at that age a woman is able to give an account of a fact as well as an elder person, for young people are more apt to speak the truth than those who are grown cunning by age. She swears, that when *Mrs. Norton* came into the room to acquaint her father that *Mr. Dawson* was come to agree for the advowson, that he answered, he was so sick in body and mind he would not do it, and was incapable of business; but *Mrs. Norton* then swore, that "by God it should be done, and that she would not starve for any of them;" that the articles were then read to him, and it was insisted that he should sign them; but he said, he was so sick that he could not do it; upon which a pen was put into his hand, and he then executed. She swears, that she believed him to be incapable of business, for he had been subject about that times to several fits, which deprived him of sense; and that he had one such about half-an-hour before; and that *Mrs. Norton* the same day had given him strong liquors; that she had frequently heard her father declare, that he would not sell the living, but would keep it for his son.

It seems, that *Mrs. Norton* over-ruled him to sell this advowson. But it is said, it is not the interest of *Mrs. Norton* to sell it; for, in the first place, she had obtained a will, whereby she was entitled to this advowson, and that it was not liable to debts; and although the will was revoked by a subsequent settlement, yet she did not know so much law as to be sensible of that. Yet notwithstanding this agreement, creatures like *Mrs. Norton* might think it better to have the command of ready money, for that is what they can

(a) In what cases a court of equity will set aside a conveyance obtained from a person of a weak mind, &c.—see *White v. Small*, 2 Chan. Cases, 103. *Clarkson*

v. Hanway, 2. Peer. Wms. 203. *James v. Greaves*, 2. Peer. Wms. 270. *Evans v. Blood*, 4. Cro. P. C. 557. *Bennet v. Wade*, post. S. C. 2. Atk. 324. best

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best deal with, and that they can conceal; and she might be afraid this advowson was settled, or liable to debts.

As to the terms of the articles: They are such as are not mutual, but only obligatory on one party; for *Mr. Bell* is not bound by them unless he pleases. The first covenant is, that *Mr. Howard*, in consideration of a guinea paid in hand, upon the request and at the proper costs of *Mr. Bell*, shall execute a conveyance of this advowson; and the covenant on the part of *Mr. Bell* is, that he will pay the purchase-money, if his Counsel approve of *Mr. Howard's* title in the premises. I am not clear there would have been any right in *Mr. Howard* to have compelled an execution of these articles, it being at the request of *Mr. Bell*; and unless he requested the sale, it was not to be. But supposing the request to be formal only, yet the articles are only to be executed if the Counsel of *Mr. Bell* shall approve of the title. This is not the usual clause; for that is, if the title be approved by Counsel; generally. And it is plain, in the present case; that *Mr. Bell's* Counsel could not approve of the title; for this very advowson is among other lands included in a collateral security, which is to continue for ever, to indemnify *Mr. Ward*, a purchaser of another estate of *Mr. Howard's*; and *Mr. Bell* could not have a good and safe sale of this advowson, unless *Mr. Ward* would join in the conveyance. And could any Counsel advise a purchase with such a perpetual incumbrance? No; for if different estates are comprised in a collateral security to indemnify a purchaser and his heirs, and a person purchases part of such comprised lands without notice of such security, and a bill is brought against him by the person who is intitled to the benefit of the collateral security, to be satisfied out of the lands purchased, this Court will turn the plaintiff about to the remaining part of the estate in the collateral security, to be indemnified out of them: but if those estates are not sufficient, or there are no other lands contained in the collateral security, he will be intitled against the purchaser for valuable consideration, and without notice; for the land itself is charged. Besides, these articles are executed in 1735, and no bill brought till October 1739, four years after; and it happens very providentially, that *Mr. Hugh Farr* the incumbent dies in September 1739, who was a good life, and as likely to live as anybody; and this advowson being fallen in is the occasion of this bill; and now *Mr. Bell* submits to buy the advowson, subject to the collateral security. The reason of the plaintiff's deferring his bill was, because he could not tell who was *Mr. Howard's* heir at law to make a defendant to his bill, because there was a cause depending between *Mrs. Norton* and the widow of *Mr. Howard*, wherein the legitimacy of *Mr. Howard* the son was disputed. But that could not be the reason, for that cause was not determined till six months after the filing the present bill; and that would not have hindered him, for he might have made them all parties.

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There is another objection against decreeing an execution of these articles, which is, that *Mr. Bell* has waived these articles. Now it is certain, that an interest in land cannot be parted with or waived by naked parol without writing; yet articles may by parol be so far waived, that if the party come into this court to have a specific execution of them, such parol waiver will rebut the equity which the party before had, and prevent this Court from executing them specifically. And *Mr. Bell* acted the part of a very good chancellor when he declared, that if the issue at law went for *Mr. Howard* against *Mrs. Norton*, he would give up his articles to *Mr. Howard* the son; but if the issue went for *Mrs. Norton*, he would insist upon the benefit of them against her: it was quite just, for she was the instrument in bringing these articles about. The issue was for *Mrs. Howard*. Therefore for the above, the plaintiff must be left to his remedy at law against the heir at law, if there be assets; for the covenant charges the heirs. The bill was accordingly dismissed (*a*).

(*a*, See *Buxton v. Lister*, 3. Atk. 383. *Savage v. Taylor*, Cases T. T. 234. *Goring v. Nash*, 3. Atk. 180.

Woodcroft against Kynaston.

Case 114.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

HARDWICKE, Lord Chancellor. This is a motion either to quash or supercede a writ of *certiorari* issued out of this court, and directed "To the mayor and sheriffs of London," in order to move a *replevin* depending in THE MAYOR'S COURT OF London: the writ is *tested* the ninth of February, and returnable in fifteen days after *Easter* into this court, so that it is not returned yet; and if it is, to remove the tenor of the record and process, and not to remove the record itself. The objections, as the ground to quash or supercede this *certiorari*, are two: THE FIRST, that it is made returnable into this court, whereas it should be returned either into the court of king's bench or common pleas immediately; and it is said, that the admitting writs of this kind to be returnable in this court would introduce vast delay; for when the record is returned here, it must be sent formally by *mittimus* into the common-law court. THE SECOND OBJECTION is, that supposing this *certiorari* may issue out of and be returnable into this court, yet in the present case it has issued erroneously; for it is not to return the record and process itself, but only a tenor of it.

A *certiorari* may be returned in chancery, and sent to the king's bench or common pleas by *mittimus*, or it may be returned immediately into those courts.

S. C. 2. Atk. 317.

As to THE FIRST OBJECTION, that such *certiorari* ought not to issue returnable in this court, but into some court of law, though I do foresee that a proceeding of this kind is liable to delay, and to be avoided if possible; yet I am of opinion, that the writ, as to that error, is a good writ. In the case of actions in *replevin*, there is not a court of record, by *pone* or *recordari*; but not by the defendant without cause.

Replevins may be removed out of inferior into superior courts. In the county court, which is

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are several ways to remove them out of inferior into superior courts.

In the hundred court, or court of any private lord, not of record, by *accedat ad curiam*; but not either by plaintiff or defendant without cause.

No method of removing proceedings out of courts of record but by *certiorari* before judgment or writ of error after.

IN THE COUNTY COURT, which is not a court of record, it is to be removed by *pone* or *recordari*; either at the instance of the plaintiff or defendant. The plaintiff may remove the action without cause, because it is his own suit; but the defendant cannot do it without cause, because it tends to the delay of the plaintiff. In the hundred court, or in the court of any private lord, which likewise are not courts of record, actions are to be removed by an *accedas ad Curiam*, but not without cause by the plaintiff or the defendant, because such removal tends to the prejudice of the profits of the lord out of whose court the cause is removed. All these three methods are to remove actions out of courts which are not of record. But in replevins in courts of records they cannot be removed by any of the said three writs, but they must be removed by *certiorari*; for there is no other method of removing records out of courts of record but by writ of error after judgment, and by *certiorari* before. And records may be removed either by *certiorari* out of this court or the king's bench; and there are precedents to prove both, *Treasurer's Brev. 77*. And as a *certiorari* may either issue out of this court or the king's bench, so it may issue out of this court, and be made returnable either into this court, the court of king's bench, or common pleas. *F. N. B. 554*. the new quarto edition, and of the *Old Edition, 245*. where it is said, that the writ of *certiorari* is an original writ, and issues sometimes out of the chancery, and sometimes out of the king's bench, and lieth where the king would be certified of any record, which is in the treasury, or in the common pleas, or in any other court of record. Then the king may send this writ of *certiorari* to any of the pleas, or in any other court of record. Then the king may send this writ of *certiorari* to any of the said courts or offices to certify such record before him *in banco*, or in the chancery, or *before other justices* wherever the king pleases to have the same certified. This is the law in this case. As to the delay; these proceedings by *certiorari* are liable to that, and at common law they were liable to great delay; and therefore the court of king's bench has made a rule to expedite the payment of costs in a *certiorari* issuing out of that court. And it would be very necessary, in conformity to them, to make some rule here to speed these proceedings, and that some short time may be fixed for a *procedendo* to go of course. I had the Curfitor with me, who told me, when the defendant had a mind to delay the plaintiff, he applied to this court for a *certiorari* returnable in this court; for then it would require some time to have it sent into the king's bench or common pleas by *mittimus*. And besides, the proceedings in replevin are more liable to delays than other actions; for there is first of all a bond given to the sheriff for a return, if there shall be judgment against the plaintiff; and if there be judgment in favour of the defendant, he may proceed upon the bond, which is a new action, or he may have a writ of *retorno habendo*, and turn the plaintiff round that way; and if an *elongatur* be returned, there is only a proceeding by

Proceedings on replevin.

by a *capias in withernam*. Therefore as to the delay which will be caused by having the *certiorari* made returnable into this court, I cannot quash or supersede it for that, as there are precedents to support ; and all proceedings in replevin are liable to delay.

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THE SECOND EXCEPTION is, that this *certiorari* is erroneous or bad, because it is not to remove the very record and process, but the tenor of them only. And upon this objection I AM OF OPINION, that this writ ought either to be superseded or quashed ; for I think it should be to remove the record itself. There is a great difference between the record itself and the tenor of it ; for the tenor is only a transcript or copy of a record, although it must be a *verbatim* or literal one ; and it has been determined in the case of libels, that *cujus tenor sequitur, &c.* must be literal, and comprehend the very words themselves. And as this writ of *certiorari* in the present case is to remove a cause of action out of an inferior court to be proceeded upon in a superior one, it ought to remove the record itself, for no proceedings can be upon the tenor. What would be the consequence ? A defect of justice ; for by this means there could be no proceedings either in the court above or below ; not in the court above, because it has only a tenor of the record, and not the record itself, before them ; yet a *certiorari* closes their hands, and supercedes all their proceedings. And there is a difference between a *certiorari* and a *habeas corpus* ; the latter may return the body into a superior court, with the cause of detention, without returning any record of the inferior court ; because when the body and cause are returned into a court of superior jurisdiction, you begin and declare *de novo* ; but where a cause is returned by *certiorari*, you proceed upon it in the same state it was in the court below, which you cannot do without seeing how it stands upon the record itself.

Certiorari must be to remove the record itself, where the action commenced in the inferior court is to be proceeded upon. But where an action in an inferior court is brought on a judgment in a superior, and *nul tiel record* pleaded, a *certiorari* to remove the tenor of the record is sufficient.

This present *certiorari* has been framed by a *certiorari* for another purpose ; for in some cases it is enough to remove the bare tenor of a record ; and from such precedent the present *certiorari* has been drawn : as if an action be brought in an inferior court upon a judgment obtained in a superior one, as it well may, and *nul tiel record* be pleaded, the court below cannot have this record but by *certiorari* out of this court ; but in those cases which the tenor of the record will do for, they do not want the record itself, but only an evidence that there was such a judgment in the court of record above, by an authentic copy under the seal of the court : but when a cause is removed out of an inferior into a superior court, to be proceeded upon there, you must necessarily have the record itself ; and if the *certiorari* direct only the tenor of the record to be returned, it will be erroneous. In *Fitzherbert* (a), and in the Commentary or Notes upon the New Edition (b), which notes are said to be LORD HALE's, and it is very probable from their great learning and accuracy that they are his, it is contained thus :

(a) Fitz. Nat. Brev. 242.

(b) Hale's edit. F. N. B. 548.

WOODCROFT ^{against} KYNASTON. " If one brings debt on a recovery in an inferior court, as in a court of piepowders, &c. there it is not necessary for the party to have the record itself (that is a *profert in Cur.*) or the tenor of it. So if one brings debt in the common pleas on damages recovered in the king's bench, or in the court of *Norwich*. But if *nul tiel record* be pleaded in the court below, it is sufficient if the tenor of the record be removed by *certiorari* into chancery, and sent thence by *mittimus* (a); but where one is to sue execution of record of another court, as where it is to sue execution in common pleas on a recovery in an *antient demesne*, or before justices of assize, or *oyer and terminer*, there the record itself ought to be removed, &c. and no execution can be on the tenor of a record." 24. Ed. 3. 79. So there is a difference where you only want evidence of a record and where you are to proceed upon it, whether as to a declaration, plea, or as to taking out execution.

In *The Register*, 288. b. there is a precedent of a *certiorari* to remove the record and process in a judgment in assize of *novel disseisin*, and which was sent by *mittimus* into the common pleas; and it is not *tenorem*, but *processum et recordum*.

To the point of returning the record, or only the tenor of it, there are two cases in *Salkeld*. In the first (b), HOLT, Chief Justice, says, "It is an error in the clerks in *London*, that upon a *certiorari* they return only a transcript, as if the record remained below; for in the common pleas, though they do not return the very individual record, yet the transcript is returned as if it was the record; and so it is in judgment of law." In the second (c), on a *certiorari* to return an order, it was returned, "*cujus quidem tenor sequitur in hæc verba*," and not "*qui quidem ordo sequitur*;" and it was quashed to this reason.

Upon all these authorities and these reasons I AM OF OPINION, that this writ of *certiorari* is erroneous: and

Then ANOTHER QUESTION grows, Whether it is to be quashed or superseded? And I cannot quash it, because no writ can be quashed but when it is returned and appears defective upon the record; but the present *certiorari* is not returned yet, so not appearing upon record.

Writs, when to be superseded, and when quashed.

In the case of *Sir John Sharpe v. Mayor of London* (d), upon a writ of *mandamus*, a *mandamus* was taken out directed "To the mayor, &c. of *London*," by their corporate names; it was moved to quash it, upon a misdirection or mistake in the corporate name; and after it had been solemnly argued, the Judges delivered their opinions *seriatim*; and the Court was divided; but when the

(a) See Year-Books 7. Hen. 6. pl. 19. 19. Hen. 6. pl. 78, 79, 80.

(b) *Rex v. North*, 2. Salk. 565. 6. Mod. 183.

(c) *The Queen v. the Parish of St. Mary in the Devizes*, 1. Salk. 147.—See also 2. Hawk. P. C. c. 27. f. 76.

(d) *Gilbert*, 255.

cause came to be argued by the Bench, MR. JUSTICE EYRE said, they could not quash the writ, because it was returned and before the Court; and that they could only quash a writ upon a defect appearing upon the record; and that the rule must be to supersede this writ. And though the Court differed as to the point of misdirection, yet they all agreed that they were to supersede and not to quash the writ.

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So this *certiorari* must be superseded.

Weston against Bowes.

Case 115.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

ELIZABETH THURLAND by deed, reciting her marriage-settlement, whereby she had power to dispose of her landed estate in the manner she should think fit, notwithstanding her coverture, in consideration of her value and affection for her husband, appoints, that her trustees should stand seised of the lands comprized in her marriage-settlement to the use of her husband and his heirs, subject to several annuities in fee; one of which, for twenty pounds a-year, was given to the plaintiff. These annuities were given generally, and not made payable from any special time: and then in the same deed of appointment she gives several gross sums in charity to the poor of several parishes, payable to the churchwardens within three years after her decease.

Power.
Feme Covert.

This bill was brought against the executors of the husband for arrears of the twenty pounds annuity incurred during the husband's life, without making the heir at law a party; and this was held sufficient for the arrears during the testator's life; but for any arrears after the husband's death which charges the heir, he must be made a party.

MR. WILBRAHAM and MR. EVANS for the plaintiff said, the question was, Whether the present annuity should commence from the execution or date of the appointment from the time of the appointee's death, or not till three years after her death? The annuities were appointed generally, but afterwards, in the same appointment, there are several charities given, not to be paid, however, till three years after the death of the appointer; but these charities are sums in gross of as different a nature as possible from the present demand, contained too in a distinct independent clause; and so this clause of the charities cannot be construed into the clause of the annuities, being of a different nature; and these annuities cannot take their commencement from the decease of the appointer, for there are no words which purport that; but they must commence from the execution of the deed: as if a lease of land be made generally, without assigning any commencement to it, it shall commence immediately; and as the husband's estate in the land commences immediately, Why should not the annuities charged upon his land do so too? The defendants say, that this

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appointment being made so long ago as 1713, and no bill filed till 1736, the plaintiff is barred by his long acquiescence under the statute of Limitations ; but this annuity is a trust, and payable by deed, and so not within the statute.

HARDWICKE, Lord Chancellor. The deed which created this annuity was executed in 1713, by which an appointment was made of an estate under a power by a wife in favour of her husband ; and it is an appointment of a legal estate, and not of a trust, as has been argued ; for she appoints the trustees who stood seised to her use to stand seised to the use of her husband in fee, which is a conveyance of the legal estate ; and she by the same deed has made this estate liable to these annuities ; as to the commencement of which it seems to be her intent that they should not commence till after her death ; for it seems an extraordinary thing, that she who has land at present in her hands, without any charge upon it, should make it liable to annuities to her relations immediately, when her husband and she might have children ; but whatever her intent was, as she has not expressed when they shall begin, the law will raise a commencement for her, viz. from the execution of the deed. And as to its being argued, that these annuities are to be paid three years after her death, those words in the appointment are so relative as to be applicable only to the gross sums in charity.

The question is, then, Whether the plaintiff can have any demand in a court of equity against an executor in 1736, when the bill was filed upon an annuity created and due by a deed in 1713 ? This, to be sure, is an unfavourable demand after this length of time, and has a commencement against the intent of the parties : and this is no trust, for the appointment is a grant of the legal estate ; for in the appointment she "limits and appoints," which amounts to a grant, and is equal to any solemn conveyance. The present demand is either a rent-charge or a rent-seck, and more naturally a rent-seck, as there is no power of distress annexed to it ; and it is not an annuity, for it is issuing out of land, and nobody's person charged ; and here the husband has been in possession of the land charged, and has not paid the rent-seck any-time during his life, which was for several years ; nor has the plaintiff taken any legal remedy against the land, but comes into this court against the representatives of the party. If you were to take your remedy upon the land for these arrears, and it had so happened that the wife had appointed the land to remain over after the death of the husband, that indeed might create a question between the remainder-man and the executors or personal representatives of the husband, Whether the remainder-man should not have an account of the personal estate, and satisfaction for the arrears of the rent unpaid by the husband during his particular estate ? but that is entirely upon another equity, for it is to exonerate the remainder from what it would be unnatural to charge it with. But in the present case, this demand of the arrears is no personal charge, or a charge against the executors, either in law or equity. But supposing you could

could come upon the personal estate of the husband, you cannot do it by force of this deed of appointment to take it out of the statute of Limitations; for by this deed there is nothing done by the husband to charge his executors, for he neither covenants nor grants. If then you cannot charge him or his executors by this deed, you then can only do it by his receipt of the rents and profits, which is in the nature of a personal charge, and within the statute of Limitations; and you are then barred by length of time, for it has been shewn before that it is no trust; and you cannot make any personal demand by virtue of the deed of appointment to take this claim out of the statute of Limitations.

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The bill was accordingly dismissed.

Ward against Henzel and Others.

Case 116.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

THIS was a bill brought by the plaintiff, as a lay-impropriator of the tithes of the parish of *Darlington*, against *Mr. Thorpe*, as rector of the parish of *Oulton*, who has received the tithes demanded by the bill, and against *Henzel* the defendant and nineteen others, occupiers of the tithe lands, to have an account of the tithes; and that *Mr. Thorpe* might set out his title to the tithes, and to what value he had received.

A bill brought by a person as lay-impropriator of tithes for an account of tithes; but the bill dismissed.

The plaintiff in his bill sets out, that he is impropriator of the tithes of the township of *Cockerton*, in the parish of *Darlington*, by an original grant from *Henry the Eighth*, after the dissolution of the body to which it belonged, being the deanery and collegiate church of *Durham*; that by intermediate grants the tithes came to some of his ancestors in *King James the First's* time, and shews his pedigree; that the tithes in dispute arise out of a place called *Grange-Close*, in the same township of *Cockerton*. But the plaintiff does not prove any receipt of tithes by himself or any of his ancestors.

The defendants admit themselves to be owners and occupiers of *Grange-Close*; but that for several years past they have paid their tithes to the defendant *Mr. Thorpe*, and that the plaintiff must seek his remedy against *Mr. Thorpe*.

The defendant *Mr. Thorpe*, in his answer, admits the plaintiff to have some estate in the tithes of the township of *Cockerton*, but denies his right to the tithes in *Grange-Close*, although it lies in the township of *Cockerton* and the parish of *Darlington*; that he, the defendant, is rector of *Oulton*; and that his predecessors have been always entitled to the tithes in *Grange-Close*: and he admits, that *Grange-Close* lies in the township of *Cockerton*; and that it is in the parish of *Darlington*.

MR. CLARKE for the plaintiff. The plaintiff is intitled as an impropriator of the tithes of the township of *Cockerton*, in which

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place the tithes in question arise, and as impropiator of a township he is entitled by common right to all the tithes within that district, for all right of spiritual persons ceases. Besides, the right of *Thorpe*, the defendant, is a very particular one; for he is rector of another parish than where the tithes lie, entirely distinct from it; nor were any assessments or duties ever paid by the parish of *Oulton* to the parish of *Darlington*, nor does it appear that *Thorpe* performs any offices of divine service in *Darlington*; for if there was any immemorial custom that the parsons of *Oulton* did any duties in the parish of *Darlington*, this property in the tithes in another parish might be good upon such a valuable commencement.

The deeds were read and the patent.

And then *HARDWICK*, Lord Chancellor, said, The plaintiff *Mr. Ward* is not impropiator of the tithes in the township of *Cockerton*; and if he was, it would be necessary for him to give evidence of a receipt of the tithes, either to himself or some of his ancestors; but this evidence is against him, for the receipt of the tithes is proved in the defendant *Thorpe* or some of his ancestors. It is true, if there be an impropiator, whether ecclesiastical or lay, he is intitled to all tithes of common right, and is not put to prove his title; but the persons who claim right against him must shew their right by deed, if they are occupiers of the land only; but the rector may prove his title by an antient receipt and perception of tithes, and it shall be presumed upon such evidence, that there is an endowment of the parson of *Oulton* of these tithes, which endowment needs not be shewn by deed, for immemorial receipt of the tithes is evidence enough of it. There is no pretence for the bill; for such bills would overturn almost all the titles of tithes in the kingdom.

Therefore the bill must be dismissed.

Case 117. Bennett and his Wife and Spencer and his Wife against
Vade and several Others (a).

In Chancery, Trinity Term, 15. & 16. Geo. 2. 1742.

In what cases a court of equity will set aside a conveyance, for fraud, imposition, and undue influence.

S. C. 2 Atk.
324. 487. 529.

THE LORD CHANCELLOR, after taking three or four days to review the evidence in this cause (which had taken four days in argument, the estate being of the yearly value of twenty-five hundred pounds), delivered his opinion in a very solemn manner to this effect:

THIS CAUSE is brought before the Court upon two bills. The original one is brought by *Mr. Bennett* and his wife and *Mr. Spencer* and his wife, as the two wives are cousin-germans, and next-of-kin and coheirs at law of *Sir John Leigh*, of *Adington*, in the county of *Surrey*; and it is to set aside a will and a settlement

obtained from him a little before his death by imposition on his weakness.

The cross-cause is brought by *Vade, Mr. Francis Lee*, and others, who are defendants in the original cause, and claim beneficial estates under the settlement which is prayed to be relieved against; and it is in order to establish the settlement of 1737, and to have an execution of the trusts therein contained. Upon these two bills the cause comes before the Court; and the principal question arises upon the original bill, which consists of two parts, which must be mentioned in order to lay one part out of the case. As far as the original bill seeks to set aside the whole devise in this court, upon the head of insanity, by decree, it is so far improper; for if it had rested upon the will as to the insanity of the devisor, it was triable at law. For ever since the case of *Bransby v. Kerr*, in 1727 (a), it must be taken as a fixed and established rule, that no will of land or realty, any more than of personal estate, can be set aside in this court for fraud or imposition (b); for a will stands upon a different footing to a deed; for though a testator be *compos mentis*, and a will is obtained from him by fraud or imposition, that affects the will at law; and as a will of a personal estate may be set aside in the spiritual court for fraud or imposition, as in the case of *Powys v. Andrews* (c); so it may, for the same reasons, be set aside at law (d), whether the devise is of lands or personalty: and the reason the law goes upon is, that fraud or imposition takes away the *animus testandi*; and such a will is not taken to be the devisor's will, but the will of another, and for that reason the will shall not prevail at law: therefore, as far as that was sought by the bill, it was very improper. But as the original bill did not only seek relief in setting the will aside, but also by an amendment upon discovery of the settlement, prayed relief against that, the case is reduced to the question upon the settlement; and luckily for the plaintiff and the Court the cause is delivered from having any consideration upon the will, because by the recoveries in 1737 that will is revoked (e): the great caution of the defendants has defeated themselves; and it is providential when it so happens. Now upon suffering the recovery the will is revoked; and though the deeds, to make tenants to the *præcipe*, are not produced (though there is no doubt but there are such), yet that will not alter the case, for it does not appear but that *Sir John Lee* was tenant in fee-simple of his lands; and he coming in as vouchee, though there were no

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Eq. Abr. 133.
406.

(a) 1. Eq. Abr. 133. 406. 3. Bro. P. C. 358.

(b) *James v. Greaves*, 2. Peer. Wms. 270. *Webb v. Claverden*, 2. Atk. 424. Anonymous, 3. Atk. 17.—*Sed vide Welby v. Thornagh*, Prec. in Ch. 123. *Herbert v. Lownds*, 2. Chan. Rep. 22. *Goss v. Tracy*, 1. Peer. Wms. 287, 288. *Farrington v. Knightly*, 1. Peer. Wms. 548.

(c) 2. Eq. Abr. 377. 421. Annally,

215. 2. Bro. P. C. 476.—See also *Archer v. Moss*, 2. Vern. 8. *Thwaite v. Smith*, 1. Peer. Wms. 12. *Plume v. Beale*, 1. Peer. Wms. 338. *Tucker v. Phipps*, 3. Atk. 360. *Marriot v. Marriot*, 1. Stra. 666.

(d) *Goss v. Tracy*, 1. Peer. Wms. 287. *Webb v. Claverden*, 2. Atk. 424.

(e) See *Brudnel v. Boughton*, 2. Atk. 273. *Hick v. Mors*, Amb. 215.

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tenants to the *præcipe*, yet he and his heirs who claim under him are bound by estoppel; and so determined in the case of *Page v. Harward (a)*, by Lord Chief Justice HOLT. And the reason why there is no want of a tenant to a *præcipe* in a recovery suffered by tenant in fee, is this: that if such *præcipe* is brought against a stranger, who is not tenant, and he vouch the tenant of the lands, and he enters into warranty, by that he admits the stranger to be tenant to the land, and so binds himself and his heirs by estoppel. But if he had been tenant in tail, this would not have estopped his issue, because he claims by a superior gift, *per formam doni*, and not through or by his ancestor; and the tenant in fee should have counterpleaded the vouchee by saying he had nothing in the tenements; and if he do not plead *non tenure* in the voucher, it is an admission that the tenants to the *præcipe* are tenants to the land; and therefore these recoveries have revoked the will, and Sir John Leigh has by them regained a *new estate (b)* to the purpose of revoking the will, although it be the old one.

The ground upon which the plaintiffs pray to set aside the settlement in September 1737 is, that it was obtained from Sir John Leigh, who was a weak person, very liable to be imposed upon; that he was actually imposed upon in the obtaining of it by the power and influence which Vade had gained over him (c); and besides that power, there are circumstances of fraud and imposition appearing upon the face of the settlement itself. Against this relief one general objection has been made on the part of the defendants, that the plaintiffs bill is framed to another purpose besides fraud and imposition, *viz.* insanity; and if it contain both, it is inconsistent with itself, for a man of insane mind cannot be imposed upon; for imposition presumes, that the party imposed upon has a power of judging of things, unless he is deceived. But as to that, I ordered the original and amended bill to be brought before me, and I have read them, and the objection will not hold; for by the amended bill the whole matter is put in issue before the Court, with notice to the defendants to make their defence. The original bill, indeed, was first founded upon Sir John Leigh's being insane and *non compos mentis*; but if that had been the case, the remedy would have been proper in this court not to set aside the will by decree for insanity, for that must have been done at law, but to have had the consequential remedy, *viz.* the delivery up of the deeds, which can only be done in this court.

But as to fraud, the plaintiffs are proper to come into this court to have the deed of settlement cancelled for fraud, and delivered up, and reconveyance; and therefore in the amended bill the charge is not only of fraud and imposition, but also of extreme weakness

(a) Salk 570. 572.

(b) Tregonnell v. Strachan, 2. Stra. 1179. Hill v. Eroughton, 3. Brown's C. C. 180. Roe v. Baldewer, 5. Term Rep. 104.

(c) See White v. Small, 2. Chan.

Cases, 103. Clarkson v. Hanway, 2. Peer. Wms. 203. James v. Greaves, 2. Peer. Wms. 270. Bridgman v. Green, 2. Vezey, 627. Evans v. Blood, 4. Brown's P. C. 557. Filmer v. Gott, 7. Brown. P. C. 70.

in *Sir John Leigh*, and that *Mr. Vade* had made use of his power over his weakness. The amended bill concludes, that either this deed may be set aside for fraud and imposition, and that the defendants may reconvey to the plaintiffs; or if the Court shall be of opinion that the remedy is at law, because of the insanity of *Sir John Leigh*, that then the trial may be directed; and there is no inconsistency in this, for a man may bring a bill depending upon different equities or grounds that may clash one with another, in order that if one fails the party may be relieved by the other; and there is no inconsistency here, for the relief prayed is in the disjunctive (a).

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The first equity which the plaintiffs charge for their relief is, that *Sir John Leigh* was a person of great weakness of mind, and of insufficient capacity to manage his affairs as a prudent man; and that this made him liable to be imposed upon by any person who got the government over him.

The second equity is, that the defendant *Vade*, from the opportunity this weakness gave him, insinuated himself into *Sir John Leigh's* good opinion, gained a power and influence over him, and exercised it in many instances, as the commanding his person and affairs; and that by the same power he obtained the present deed from him.

The third equity is, that upon the very face of the deed itself there appears to be fraud in the obtaining of it.

As to the first head of equity, viz. *Sir John Leigh's* weakness and inability to manage his own affairs, that is very plain to me, notwithstanding all the evidence read on the part of the defendant, that *Sir John Leigh* was a very weak man, but one remove above idiotcy, or being a lunatic; for that he was not either I shall take for granted, and am justified by a jury of gentlemen upon an inquiry issued out of this court finding him not to be so; and this weakness is an evidence very strong for the plaintiff. It has been said on the part of the defendant, that all the evidence of the plaintiff in the original cause, if it is so to be believed, and proves any weakness at all, it proves it to a degree of insanity; and indeed, from what several of the witnesses say, it does amount to insanity; but as all those testimonies are matter of opinion, and as the boundaries between an *actual insanity* and *great mental weakness* are but very narrow, it is no surprising thing that some of the witnesses should be mistaken in judgment, and take that for real insanity which is no more than great natural weakness.

It is uncontradicted, that from the time of *Sir John Leigh's* marriage with *Sir Stephen Leonard's* daughter he and his affairs were under the entire governance of *Sir Stephen*, and that after his decease he fell into the management of *Sir Samuel Leonard* his son, and continued so for many years, and till *Sir John Leigh* had a

(a) See *Stapleton v. Stapleton*, 1. Atk. 335. *Cook v. Martin*, 2. Atk. 3. *Grimes v. French*, 2. Atk. 141. *Dor-mer v. Fortescue*, 3. Atk. 132. *Weymouth v. Bowyer*, 1. Vezey, jun. 426.

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son upwards of twenty-one years of age, under whose care he was then left; and the son was a guardian both to his father's person and fortune for nine years, when the son unfortunately died. After his death, *Sir John's* well-wishers were so sensible of his weakness, that several neighbouring gentlemen were solicited to take upon themselves a kind of voluntary trust and custody of his affairs. *Mr. Onslow*, the speaker of the house of commons, was applied to amongst the rest; and though he declined anything personal himself, yet he recommended it to other gentlemen, and was at several meetings for that purpose at *Sir John Leigh's*; and upon advice one amongst another, *Sir John Leigh* seemed to take no notice, but said nothing, and behaved like a person who was to fall under the custody of some one or other. *The Speaker* advised him, as he would warn a child from fire or water, not to set his hand to any writing whatsoever. The gentlemen of the country undertook this trust, which they would not have done if *Sir John Leigh* had been capable to have acted without them; and if he had been a man of any sense, he would not have submitted to their governance over him. Beside *Sir John Leigh's* natural infirmities, he added by his excessive drinking, for he would often get drunk, and *Mr. Vade* would drink with him till twelve o'clock at night very frequently; so that towards the latter end of his life he was full of bodily disorders, very lame, quite blind of one eye, and almost dark of the other, which was the case when he executed the will and settlement: and all these things rendered him more liable to be imposed upon. Besides this general evidence of his weakness, and he being easily imposed upon, there is a special instance given, which was this: When it was judged necessary, upon a mortification, to take off his toes and part of his foot, *Mr. Vade* persuaded him that his toes would grow again; and though the defendants say, that this was a pious fraud under this calamity to soothe *Sir John*, yet to be sure it is a great sign, at the same time, of his weakness and incapacity. It is proved by *Mr. Dicken* the surgeon and *Mr. Cheselden*, who attended him in this mortification, that in consulting upon his case they never regarded the decorum of their profession, but determined upon their operations openly before him, without ever advising with him: for they used him like a child, as they took him to be as weak.

There is another proof of weakness of *Sir John* in his marriage, which was thus: There is *Mr. Vade*, a surgeon and apothecary, brought to attend a gentleman of *Sir John Leigh's* quality and estate under his mortification, and finds him under such a state of weakness, that he contrives with *Mr. Douglas*, a surgeon in London, to marry him to *Mr. Vade's* daughter, a girl of about sixteen years of age, to an infirm man of about fifty-five; that they talked before *Sir John* about his marriage as though he was not in the room; and one of the company propoed *Mr. Vade's* daughter as a proper match: but *Mr. Vade* answered, he would not marry his daughter to such a fool and madman. However, he gets the better of this nicety; and on the fifteenth of May 1733, when *Sir John Leigh*

is in town, he is made to believe that he is going to a christening. When he is there, they hurry him away to *Mr. Gheton's*, a colour-man's in *Long-Acre*: they tell him, upon his asking, that he is going to a friend's. When he comes to *Mr. Gheton*, there was such immoderate drinking of punch that he is quite fuddled. *Mr. Douglas* and *Vade* step for a *Fleet* parson, and *Gill*, a servant who used to attend constantly on *Sir John's* person, is sent away, with other servants, to an alehouse. The parson and the young lady are then introduced; and during the marriage-ceremony *Sir John* is put with his back to a chair, and supported under the two shoulders by *Mr. Vade*; and he was so drunk and insensible that he could make no responses; and *Mr. Vade* once letting loose of his hold, *Sir John* fell down on his back, unable to stand. After this *Mr. Vade* and his daughter take up their habitation at *Adington*, and manage all affairs, and *Sir John* shews no passion or concern at it; but if he had been a man of sense or spirit, and not to the last degree weak, he would have resented such an infamous imposition upon him. There is evidence on the part of the defendants to controvert this, and to shew, that *Sir John Leigh* was capable of managing his affairs, though most of the deponents for the defendants swear, that he was not able to judge of or understand the will or settlement, or to manage his property; but several of the witnesses swear, that he was a man of learning, a good scholar, and capable of managing his concerns; nay, one goes so far, that he is as capable of doing it as any man in *Surrey*. But strong as this evidence is in words, it weighs very little with me, because it is contrary to plain facts admitted on both sides; and when that is the case, the facts must and will speak for themselves. But can anybody credit the evidence of some of these witnesses, when it is plain *Sir John* believed his toes would grow again; that *Sir John* tamely submitted to the indignity of such a marriage, &c.? The evidence of *Sir John Leigh's* being an excellent scholar, that he understood classical authors and figures, I do not doubt but that he was capable of learning something of this nature; for it often happens, that people *non compos*, or if not so yet very weak, may retain some things or pieces of learning which have been taught them in their youth, and yet the same people be incapable of remembering facts or new incidents; and you may go into *Bedlam* and meet with people who will talk *Latin* and impose upon some such witnesses as these.

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As to the evidence of the defendants in regard to *Sir John Leigh's* capacity in managing his affairs, there are some things shewn to that purpose. After the commission of lunacy issued in *April 1733*, *Mr. Vade* took care to instruct *Sir John* in some things in order to shew his capacity to manage his affairs. To this purpose he made him write some receipts, and copy others, and to talk with his tenants about money; but it is proved that he could not distinguish a guinea from a moidore or a pistole; and after the marriage it is plain, *Mr. Vade* took upon him the whole care of his affairs.

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As to the second head of equity, for the plaintiffs it is proved in the cause, that *Mr. Vade* having got *Sir John Leigh* in his power after the marriage, gave rise to a commission of lunacy being taken out by the heirs at law, who now thought it high time to do it; and they were not to be blamed. However, upon the execution of that commission, it appears a great noise was raised in the country about it by the industry of *Mr. Vade* and his friends; as, that the heirs at law were come to take him into custody, and to deprive him of his estate; and it often happens, that the thing which the law provides for the protection of a man and his estate is taken to be a proceeding against him. The commission did not succeed, for he was found not to be a lunatic; upon which it was natural for *Sir John Leigh* to be provoked at these relations for taking out such a commission against him. *Vade* took care to incense *Sir John* upon this head, and to say the worst of things against *Mr. Bennett* and *Mr. Spencer*; and when *Mr. Bennett* came to see *Sir John*, he was denied admittance; and a letter was sent in 1737, signed by *Sir John Leigh's* name, to *Mr. Bennett*, but by whom wrote does not appear, wherein *Mr. Bennett* is desired never to come near *Sir John* more, for he would not see him. But this letter, no doubt, was a contrivance; for there is a copy of it signed by *Sir John*, and attested by two persons, which in ordinary cases is not done; but this was done for the justification of somebody, when there should be occasion. If these relations had been admitted to see *Sir John*, they might have acquainted him with their reasons for such a procedure, have begged his pardon, and have been reconciled to him; but they are prevented from making any visits, and with a strong hand too. A watchman is set upon *Windmill Hill* to see when any coach was coming; and that was not out of any apprehension of *Sir John's* being carried forcibly away, for the many servants in the family would have prevented that; and it was designed merely to exclude any intercourse between the heirs at law and *Sir John Leigh*. *Mr. Vade* gave orders too, that if any letters came directed to *Sir John Leigh*, that the servants were not to deliver them to their master or lady, but were to keep them till he came home; and it was sworn, that a letter came directed to *Sir John Leigh*, which was opened first by *Mr. Vade*; and the intent was, that if any letters came which were prejudicial to *Mr. Vade's* interest with *Sir John*, they were to be suppressed, but if they were letters of course they were carried to *Sir John*.

As to *Vade's* power over *Sir John Leigh's* affairs, he transacted them as he thought fit, and made him sign any papers he thought fit to bring to him; and at night, when they were drinking, all persons were excluded from *Sir John Leigh's* company except those whom *Mr. Vade* admitted; and he would not suffer anybody to speak to him but in his presence; and when *Mr. Paris* came to *Sir John Leigh*, from the speaker *Mr. Onslow*, to enquire about his marriage, *Mr. Vade* did not once go out of the room. Nay, *Mr. Vade* had gained such a power over him, that his name was a

terror

terror to him, and the nurse was used to quiet him like a child, by repeating only the name of *Vade*.

As to the third point of equity for the plaintiff, that upon the face of the deed itself there appears to be fraud in the obtaining of it. It is a settlement by lease and release, bearing date the ninth and tenth of *September 1737*, and *Sir John Leigh* died in the *November* following; so that it appears to be obtained in the latter part of *Sir John's* life, when his infirmities had made his capacity less, and *Mr. Vade's* power greater.

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By this settlement, the whole estate is settled and conveyed to *Mr. Wynne*, *Mr. Tonks*, and *Mr. Welchman*, and their heirs, to several uses, viz. to the use of *Sir John Leigh* for life, remainder to trustees to preserve contingent remainders, remainder to the first and every other son of *Sir John* in tail, remainder to his daughters in tail. But these remainders to his issue are only colourable, for *Sir John* was grown very infirm and aged, and his wife dead, so that there was scarcely any possibility of issue. Then an annuity is given to *Wildman* and his wife, and the survivor of them, for their lives, of forty pounds a-year, chargeable upon and issuing out of the whole estate. Then as to the estates in *Surrey*, after the above remainders they are limited to the use of the defendant *Francis Leigh* for life, remainder to his first and every other son in tail male, remainder to the use of *Thomas Leigh*, younger brother of *Francis*, in like manner, remainder to *Francis Jones* for life, remainder to trustees for five hundred years, remainder to his first and every other son in tail, remainder to his daughter in tail, remainder to *Thomas Leigh* and his heirs.

Then as to the estates in *Kent* and *Middlesex*, they are limited to the use of *Vade* the defendant and his heirs for ever. Then follow some provisos. The first, that it shall be lawful for *Sir John Leigh* to demise the land for a certain number of years, or three lives, receiving the most improved yearly rents which can be got without fine, and so as such leases are not made dispunishable of waste. Then follows another proviso, containing a power of revocation, wherein *Sir John Leigh* has the liberty to revoke or make void all or any of the uses, clauses, limitations, &c. included in the same settlement, by any writing duly sealed and delivered, so as it be made in the presence of and attested by *James Leigh*, of *Beckenham*, in the county of *Surrey*, *John Eton Dodsworth*, of *Goodman's Fields*, and *James Douglas*, of *London*, merchants.

By this settlement, *Sir John Leigh* has absolutely disinherited his heirs at law, who were also his next of kin, and has given his *Surrey* estate to *Mr. Francis Leigh*, who, as the matter is before me, does not appear to be any relation to *Sir John Leigh*; for there is no proof at all how near in kindred he was to him, nor does it appear that he was so much as ever acquainted with him, or that *Sir John Leigh* ever testified any friendship for him. A remainder of the same estate is limited to *Mr. Thomas Leigh*, who is a material

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material witnesses for the plaintiffs in proving *Sir John Leigh's* weakness and *Mr. Vade's* power over him. As to the heirs at law, it is proved by *Mr. Scott*, that when *Sir John Leigh* talked reasonably, he was used to say he would bestow his estate to his right heirs. As to the *Kent* and *Middlesex* estates, they are given to the defendant *Vade*, who was no acquaintance at all of *Sir John's* till he attended him in his mortification, and who had no other merit but that of marrying him, and managing his affairs in the most infamous manner.

Sir John Leigh had a power over his estate in fee-simple; and notwithstanding a will is the most proper way of making voluntary dispositions, because of the little difficulty in revoking them, and notwithstanding there was a mortgage of three thousand pounds upon the estate, yet is he persuaded to make a voluntary settlement, and to fetter himself in such a manner that he could not, in effect, make any other disposition of it, or raise one shilling off it for his own benefit; for as to the power of leasing, it is made as strict as those in marriage-settlements, for he is not to make leases in reversion, nor upon fines or small reservations; so that he could not raise any money.

Then as to the power of revocation, it is of the most extraordinary nature I ever met with, and speaks imposition. And it is certain, the framer of this settlement was sensible, that if he had not inserted some power of revocation, it would have been an objection to the deed in this court; and it has been almost foundation enough itself to set aside a voluntary settlement, that there has been no power of revocation in it: for this purpose there is a power of a revocation, but such an one that it should be in the power of *Mr. Vade* or his friends whether *Sir John Leigh* should ever have it in his power to execute it or not, for it is to be executed in the presence of three persons, their executors, administrators, and assigns. Is there any proof whether he was acquainted with these three gentlemen? No. Is there any proof that he directed such a power? No. It is said, if there had been any charge of this nature in the bill, the defendants might have examined as to that; but they had notice enough of this objection, for the settlement itself was impeached, which was notice enough to make defence in support of the power of revocation; and the objections would naturally arise upon this proviso or power of revocation. Suppose *Sir John Leigh* had been seized with a sudden illness, and was desirous to make an alteration in this settlement, he could not convene these three gentlemen together, perhaps, for they would not possibly come; and if they had died, *Sir John* is under the necessity to find out their executors, administrators, or assigns. It is said, this part, "the executors, administrators, or assigns," is nonsense, because this is a personal trust, not assignable or transmissible to representatives. AND I AM OF OPINION, it is part nonsense and part not; and I have known very foolish weak things done with a very villainous intention; and these words, "executors, administrators,"

"strators, and assigns," fetter this proviso more, for there may be no such representatives; and if there are such, it may be more difficult to find them than the gentlemen they represent. But it is said, in case there had been no representatives, or the gentlemen had refused to have come, and *Sir John Leigh* had done all he could to convene them, the revocation without their being present would be sufficient. AND I AM OF OPINION, that such revocation would be good, if executed for a valuable consideration; but if a voluntary revocation, it would not be good; for these gentlemen are to be checks upon *Sir John*, to prevent his being surprized into anything, and they ought to have been present; and he might have as well wanted to have made a voluntary revocation as not. But it is said, if *Sir John* wanted to raise or borrow money, or to sell his estate, or to make any new settlement for a valuable consideration, that that will be good, and prevail against any voluntary settlement, by the statute of 27. *Eliz.* c. 4. But *Sir John* had not knowledge enough to know that the law is so; and I believe the party who drew the conveyance knew not so much; but by this revocation they fettered *Sir John* as much as they could; and if *Sir John* wanted to raise money, or to sell, would any prudent man have ventured his money where there was so restrained a power of revocation, if the gentlemen had refused to have been present at the execution? They had got a will from *Sir John* before, but that was too slippery a thing for them; it was always revocable, and *Sir John* might be got out of their power and revoke it; and therefore they pinned him down by this settlement.

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This restrictive power of revocation has been compared at the Bar to the case of the *Duke of Mountague v. Bath* (a). That was a settlement made by *Charles Duke of Albemarle*, who was going as Governor of *Jamaica*. In this settlement was included a power of revocation in *his Grace*, so as it was executed in the presence of six witnesses, three whereof to be peers of *England*; and it was said, that *his Grace* was more restrained by such a power as this than *Sir John Leigh* by the present; and yet that was a very good one. But that was a different case; and as to what was said at the Bar, that *his Grace* was then just going to *Jamaica*, where it would be impossible for him to revoke this deed according to the expression, for he would not be able to get three peers of *England* in that island, I have looked into the case, and the fact is not taken notice of there. If so, it is out of the case; for if he was to be resident in *London*, it would be no difficult matter to execute this revocation according to the formality of it; for it would be a very easy matter to persuade three peers of *England* to be at the execution of such a power of revocation, and to attest it; but it was proved in that case, that the deed was made between relations of the family, and that it was drawn up by *Sir Thomas Stringer*, the family Counsel, by the direction of the *Duke* himself, and perused by *Sir William Jones*, whose hand-writing appeared before this

(a) 3. Chan. Cases, 55. 2. Chan. Rep. 417.

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very proviso or power of revocation; and *Sir William Jones* also was a witness to the deed; and that is not like the present case, for the present settlement is not made to relations or people of the family, no Counsel advised upon it, and no instructions given for it by *Sir John Leigh*.

As to the manner of the execution of this settlement, it does not appear to have been read over to *Sir John Leigh* at the time of the execution; and indeed the ingrossment very often is not read over, if the draft has been read over before. But *Mr. Wildeman* who prepared the draft swears he did read it over before *Sir John*; but I lay very little weight upon that, because things were often said in his presence without his taking any manner of notice of them; nor was this deed left with *Sir John*, but taken away by *Mr. Vade*. How, therefore, could *Sir John* tell how to execute this special power of revocation? And therefore this is a circumstance which makes this deed equivalent to an absolute conveyance.

In order to support this deed, the defendant has gone into a general intention in *Sir John Leigh* to disinherit his heirs at law, and to give his estate to the persons to whom it is limited in voluntary settlement; and from the will executed the seventh of *August* 1733, and the codicil in *April* 1735, and afterwards the will which gives these estates to the persons in the present settlement, the Counsel for the defendants infer, that these antecedent acts prove that the present settlement did not proceed from surprise, but from intention. But what is remarkable is, that all those wills are executed after *Vade* had got this power and influence over him, and just after the inquisition of lunacy was executed against *Sir John Leigh*, and when he was under resentment for that usage. The first will of *Sir John Leigh* is a devise of his estate to trustees to raise money to pay his debts; and then a rent-charge of eight hundred pounds *per annum* is given to his wife, *Mr. Vade's* daughter. He also gives her his house at *Addington*, and one hundred pounds *per annum* to maintain it in repair; and then gives her all his personal estate. Then all his real estate is given to himself for life, remainder to the heirs of his body, subject however to annuities to *Twynie* and *Stalker*, who were assistants in the marriage, of thirty pounds a-piece; and these are like the annuities in the settlement to *Wildeman*.—*Mr. Stanley* says, *Sir John Leigh* gave him instructions to make this will; but whether they were in writing or not does not appear; or whether *Mr. Vade* had any hand in them. This will seems very modest; for *Mr. Vade* upon the face of it has not given himself anything; but there was a codicil, which the defendants were very unwilling to read, by which when produced it appears, that *Sir John Leigh* gives his manor of *Westwickham*, for five hundred years, to *Mr. Vade*; and then there are uses to *Sir John's* issue after this term. *Mr. Stanley* does not appear to have had any hand in this, but it seems to be the hand-writing of *Wildeman*; and this term is irredeemable, and

as good as the fee-simple. After this follows the will of 1736; and by that he disposes of the estate, after the death of the wife, in the same manner almost, as to the beneficial uses, as he has done in the voluntary settlement, except as to *Sir Richard Leigh*, who has no remainder in the settlement. *Mr. Vade* is made executor of this last will, and has the personal estate. Both these wills, being revoked, are out of the question, except as to the evidence of *Sir John Leigh's* general intention of the disposition of his estate. But I am of opinion, there is no evidence at all of that, for they are both made after *Mr. Vade* had got the power over him, and could make him sign what writing he would. The case of *Standard v. Metcalfe* (a) was, where a settlement had been obtained from *Mrs. Barbara Standard*, who afterwards proved to be a lunatic, and under a weakness perhaps at that time; this Court inclined to set it aside, but its judgment was altered by a will executed by *Mrs. Barbara Standard*, and a codicil thereto, when she was in her senses, and not under the influence of the persons who were benefited by the settlement; and this will and codicil were to the same uses as the settlement; which shewed the general intention of bestowing it according to the disposition in the settlement; and it appeared the draft was made of the settlement by the directions of *Mrs. Barbara Standard*, and left with her for her perusal, and her intention supported by witnesses who were not parties to or benefited by the settlement. But none of these advantageous circumstances are in the present case; and the evidence to shew the fraud in this settlement is very strong.

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AND HIS WIFE
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S. C. cited post.

Three objections are made for the defendants.

THE FIRST, That *Sir John Leigh* was a lunatic; and then the evidence of imposition is out of the case, and it is to be tried at law.

THE SECOND, admitting it should be taken by the Court that he was not a lunatic, yet there has been no imposition; and that there is no sufficient evidence of any such thing.

THE THIRD, supposing there was evidence of fraud and imposition, yet it is such as the heirs at law cannot take advantage of, because there is the plea of the intention of *Sir John Leigh* to disinherit the heirs; and if it is to set aside the settlement, it should not be in their favour.

As to the first, the Court is at liberty to take the evidence as a proof of weakness of mind; for as a jury of gentlemen, upon their oaths, found him not to be a lunatic, it is reasonable for the Court to say he is not so; and the boundaries between weakness and lunacy are so very narrow, that the Court must judge of them upon the facts and circumstances; upon which it appears to me that he was not *non compos*.

As to the second objection, the Counsel for the defendant say, if *Sir John Leigh* is not a lunatic, but only weak in mind, that that

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very weakness supposes him, under certain circumstances, capable to do an act, which act shall stand, unless there is evidence of imposition. And it must be taken he was capable to do an act; and then the question will be, Whether there was not imposition? Which I have before decreed there was, and will not repeat, but will in this place only take notice of the evidence of *Dr. Barnard* for the defendant; which, from his known character and integrity, weighs much with me; and it is in relation to the execution of the will in 1736. The Doctor was present at the reading over and execution of it; and swears, that *Sir John Leigh* appeared to him to be of sound mind, memory, and understanding, at the time of such execution; and what he meant by sound mind, &c. is proved from a former part of his deposition, upon his talking with *Sir John* about classical learning; and *Dr. Barnard* swears, that *Sir John* understood the will, and what he did, and that he was capable of managing his affairs by the assistance of those he chose, for he himself was lame, and almost blind; which is an admission he could not do it without such assistance; and it is plain what that assistance was, viz. *Mr. Vade*, who had the absolute management and conduct of his affairs.

As to the third objection, whereby it is insisted, that *Sir John Leigh* had a plain intention to disinherit his heirs at law, and was not imposed on in that, and therefore no ground of equity to relieve the heirs in giving back the estate to them, contrary to the intention; as to that, it is to be considered under what circumstances he became possessed of the intention of disinheriting his heirs at law, and whether that did not proceed from the same imposition as the deed did. It is proved by *Mr. Scott*, that *Sir John* often said that he would not give his estate from his heirs; and, When is it that he alters this intention? Why, when *Vade* comes to have the management of him, and when the commission of lunacy was taken out by the heirs at law, which *Mr. Vade* took an opportunity to make an occasion of disgust against the heirs: and the interception of the letters of the heirs at law to *Sir John* was proved; and this imposition was as plain as any imposition in any other part of the case. The person too who takes the most beneficial interest in the will and settlement says, that the transaction was most iniquitous, and the heirs at law might set the deed aside; and this is proved by two witnesses of *Mr. Francis Leigh*. Then as to the objection, that if this settlement is set aside, the heirs at law ought not to have the estate, because of the plain intention to disinherit them, there have been instances where people have been prevailed upon to execute a settlement against their intention, and they intended to give the estate to another person; yet when such settlement is set aside, the Court cannot give the estate to the party designed to have it, but it goes to the heir at law, which is the consequence of law and equity; and it goes in the proper course of descent; and there is the less reason to support this settlement, when the person who takes the most beneficial interest admits the will and settlement to be fraudulent. And this case is very like that of *Topp v. Stanhope*,

Stanhope (a), where a mother got her son, *Sir John Topp*, into her power, and by the assistance of *Dr. Stanhope*, her son by another marriage, had prevailed with him to leave his mansion-house and reside with them. *Sir John Topp* was a very weak person, almost a lunatic, and as proper an object of a commission as *Sir John Leigh*. When *Sir John Topp* was there, they obtained settlements from him; and it appears from the printed case, that the circumstances were the same there as in the present case; the only difference is this, they did not give him a wife to fetter him by that means, but he got one himself, who delivered him. It was proved, that he had fits; that they kept all persons from having access to him; intercepted letters, and did not suffer them to be delivered to him; they could make him sign what deeds and writings they pleased, and made him copy over letters they had dictated to him. As to the settlement itself, there was no evidence of imposition as to *Mrs. Topp* and *Dr. Stanhope* but what arose from their general conduct towards *Sir John Topp*; but for that, and the general frame of the deeds, they were set aside in this court; and there was an appeal by the mother and *Dr. Stanhope* against this decree, which was affirmed in the House of Lords on the twentieth of May 1720, with one hundred pounds costs. The evidence of the weakness of *Sir John Topp*, and the power and government of the mother and brother-in-law, was not one-tenth so strong as in the present case.

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Therefore the present settlement is to be set aside, and the estate conveyed to the heirs at law (*b*).

(a) 2. Brown's P. C. 183.

(b) See *Bates v. Greaves*, 2. Vezey, jun. 287.

Richards against Baker (a).

Case 118.

In Chancery, Trinity Term, 15. & 16. Geo. 2. 1742.

JOHN RICHARDS, the plaintiff's father, made his will, in which, among other things, was this clause: "I devise to my loving wife, *Dorothy Richards*, the sum of two hundred pounds, to be paid in three months after my death, and all my household goods, plate, linen, and china, belonging to my house at *Teddington*, and also my house and gardens thereto belonging, so long as she continues my widow, and no longer" (which last clause was interlined), "together with my jewels, coach, chariot, and coach-horses;" and devised all the rest and residue to the child of which his wife was *enceinte*, if a son, and if not to *Isaac Richards*;" and made the child executor, if a son, and the defendants executors *durante minori etate*.

"widow, together with his jewels, coach, and coach-horses," she takes the jewels, coach, and coach horses *absolutely*, and the use only of the house and furniture during her widowhood.—S. C. 2. Atk. 321. 2. Burr. 480. 8. Viner. Abr. 215.

(a) Reg. lib. B. 1741. fo. 340.

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The plaintiff, who was the child of which the wife was *enceinte*, filed his bill to establish the will; and it was ordered at THE ROLLS, that the wife should deliver a schedule of those things which were specifically devised her during widowhood (a), without determining to what part of the devise the limitation extended.

And, on an appeal, it was argued by MR. BROWN, that those words, "so long as she continues my widow," must extend both to the clause precedent to them, in which the furniture is devised, and to the subsequent one, which gives her the jewels; and he cited two cases in 1. Ro. Abr. 844. and the case of *Lake v. Bennet* (b), decreed by LORD HARDWICKE, February 1, 1737, where Sir John Lake, by codicil, disposed of his household furniture in this manner: "I give to my niece one hundred pounds, and the house I live in during her life, together with the household goods, plate, pictures, and linen:" and it was decreed, she had only a life-interest in the house and furniture; and the words "together with" are connected with the two clauses.

HARDWICKE, Lord Chancellor. This will is very doubtfully penned. As to the decree at THE ROLLS, it was said, there was no determination of this matter. Whether it was debated or not does not appear; but certainly it was taken for granted that something was given to her only during her widowhood. But however, be that as it will, the question comes before me on the foot of the devise. And the words are, "I devise to my loving wife, Dorothy Richards, two hundred pounds," which is a legacy given her absolutely. Then comes, "and all my household goods, plate, linen, &c." And the question arises upon these words of limitation as to their relation and extent; and, whether they are to be confined to the house and gardens, or to extend to the linen; or, lastly, whether they are to be carried on to the "*simul cum* my jewels, coach, &c." Now, as to the first part, I cannot be of opinion that it is confined to the house and gardens, but that it at least extends to the furniture, &c. This is a natural construction; for it is not an absolute bequest, but restrained to the *res continens*, viz. the house in which they were; and it was his view they should go together; and as this is the natural sense, the words pursue it, for it is impossible to divide them; they fall under the same devising verb, and under the same description of devise. Some cases have been cited, but there is one more modern on the same subject, I mean the case of *Cole v. Rawlinson* (c). It is true, Lord Chief Justice HOLT differed from the other Judges. The words were there, "I give, ratify, and confirm, all my estate, right, title, and interest, which I now have in it, and also the house called the Bell Tavern, to John Bellingsley;" and the question was, What estate John Bellingsley took in the Bell Tavern by this devise? And Lord Chief Justice HOLT was of opinion, that the words "all my estate" extended only to the first clause; but the

(a) See *Bill v. Kinston*, 2. Atk. 82. 831. 1702. S. C. Holt, 744. — See also

(b) 1. Atk. 470.

3. Viner's Abr. 215. and the cases there

(c) 1. Salk. 234. S. C. 2. Ld. Ray. cited.

other three Judges held it was but one sentence (a); and put the case of translating it into *Latin*; but what they laid the greatest stress on was, the whole sentence being governed by one verb; but the case is stronger here, because the words of limitation follow both. It has been observed, that these words are in *an interlineation*; and from hence it is inferred, that this was a mere intention in the testator, and that the first copy was written without any interlineation, and then he bethought himself of adding that clause. But I doubt that is too uncertain a conjecture for me to found a decree on, and would make the construction of wills very doubtful; for these interlineations may arise from different causes. It might be left out of the copy; and what makes way for that conjecture is, that the word "belonging" is twice used in two lines; and the clerks skipping over the lines is often the cause of error both in the *Greek* and *Latin* authors. If that be so, it makes way for the other part, that they were inserted to restrain both; and I am of opinion it goes to both. As to what has been said of these things being perishable is not material, for notwithstanding we often see people provide that china and furniture of that sort shall descend with the house.

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The next question, If this limitation is to be carried on? will bear a different consideration; for I may give one thing for life, together with another thing in a different manner, unless there is some connexion between the things given; and if they were appurtenant, I should be of opinion they were given in the same manner; but these things are entirely of a different nature, and extraneous to the house. As to the jewels, they probably were her *paraphernalia*, and there was no occasion to make them appendant to the house; and if these words were inserted on a new consideration, his placing them in that part of his will was an indication of his intention: and indeed, whether they were interlined or not, their coming before the jewels makes this the most probable construction; for if he intended otherwise, it would be more natural to place them afterwards.

AND IT WAS DECREED, that *Dorothy Richards* is entitled to the absolute property of the jewels, coach, chariot, and coach-horses, given to her by the will of *John Richards*; but that she was intitled only to the use of the testator's household goods, furniture, plate, linen, and china, in his house at *Teddington*, wherein he dwelt, or to the house belonging, during her widowhood.

(a) And the judgment given on the opinion of the three Judges was affirmed in the House of Lords, 1. Brown's Cases in Parl. 108.

Case 119.

Richards against Sims.

In Chancery, Trinity Term, 16. Geo. 2.

The Court will not grant a new trial, upon a suggestion that the party was not apprised of a particular evidence (a).

ON A MOTION for a new trial the case was thus:—*Richards* the plaintiff, as administrator of his father, brought a bill in 1739 for the discovery of deeds and papers, and to foreclose a mortgage of fourteen hundred pounds. The defendant insisted on a gift made to him of the mortgage-money by the intestate a little before his death.

S. C. 2. Atk.

319.

S. C. Bar. C. 9c.

On which two issues were directed: FIRST, Whether *Richards* gave the deeds, and what deeds, to *Sims*? SECONDLY, Whether he forgave the debt to *Sims*? Both these issues were found for the plaintiff at the bar of the court of king's bench, where there was evidence given that the defendant's witnesses (by which he proved his gifts) were not at that time in *Richards*' family. *Vere*, one of them, was sworn to have sailed in *The Triumvirate* to *Lisbon*, where *Russell* swore he drank a pint of wine with him; and the other witnesses were all sworn to be absent at that time.

And now IT WAS MOVED for a new trial on many affidavits, which proved the witnesses present, and denied the *alibis*; but one of the defendant's witnesses, who swore that *Vere* was not in *The Triumvirate*, was not there himself, and so could not properly attest *Vere*'s being absent.

On the other side an affidavit was read, by which it appeared, that *Walbridge*, one of the witnesses, told *Sims*, a fortnight before the trial, he was afraid it would be proved that *Vere* was abroad at that time, and mentioned the ship he sailed in, and the place to which he sailed.

MR. BOOTLE for the plaintiff *Richards* cited the case of *Wood v. Gunston* (b), and the case of *Gay v. Crofs* (c), to shew how unwilling the Courts were to grant new trials after trials at bar.

HARDWICKE, Lord Chancellor. This is an application for a new trial, and comes after great length of time and very extraordinary circumstances. On the ninth of November last the issue was found, and a final decree made in December; and at last he applied for a rehearing on the equity reserved, in order to let himself into this motion. The ground for this motion is, that *Mr. Sims*, the plaintiff at law, was surprised, and the verdict obtained by surprise, because he had no notice of the evidence; and for that reason he could not produce any witnesses to encounter it. Against this many objections have been made, some general, some particular. The first general one is, that this is a trial at bar; and the old rule

(a) *Hennel v. Kelland*, 1. Eq. Abr. 377. *Coddington v. Webb*, 2. Vern. 240. *Stace v. Mabbot*, 2. Vezey, 553.

(b) *Stiles*, 55.—See 3. Keb. 555. Salk. 363.

(c) 7. Mod. 37. Holt, 703.

is, No new trial shall be granted after a trial at bar ; and I do admit, there have been distinctions taken between *trials at bar* and *nisi prius*, because they are considered as subordinate jurisdictions (a); and new trials are not very antient. The first one reported is the case of *Wood v. Gunston*, in the thirteenth year of *Charles the Second*. But THE LORD CHIEF JUSTICE used to say, he doubted whether they were so modern as is generally thought, because giving a verdict before in the same cause was a good challenge to a jurymen. But I am not clear of this, because it might happen on a *venire facias de novo*. However, this matter was solemnly settled in the case of *The King v. The Corporation of Bewdley* (b), where the jury gave a general verdict, contrary to the direction of the Court ; and eleven Judges against MR. JUSTICE JOHN POWELL agreed, that a new trial should be granted.

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Stiles, 462—6.

Another general objection is, that it is contrary to the rules of the common law. And I take it to be so ; for the rule there is, that no new trial shall be granted for want of attendance of witnesses ; and the reason is plain, because issue is joined, and the point fixed in the pleadings ; and nothing but that fact appears ; and great variety of facts and circumstances may be material ; and neither side is bound to give notice : and it is impossible to know on what the verdict is founded ; and if new trials were to be granted on these causes, nine verdicts in ten would be set aside, and nothing could be reduced to a certainty ; and if those circumstances were laid aside, yet the jury might find the same verdict, and so every time one's case would be weaker, and nobody can tell whether the jury founded their verdict upon this or that piece of evidence.

It is said, and with reason too, that there is a difference between a trial at law and an issue directed by this Court, because the latter is to satisfy the conscience of the Court ; and the parties do not come to that trial with the same uncertainty as at law : and to be sure this is reasonable ; for when the matter has been examined into here, and new evidence produced at the trial, it is but just to grant a new one. But I should not grant a new trial on a motion grounded on affidavits ; for let me be never so clear in it myself, I would have the opinion of the king's bench to know if what was contained in the affidavits as the ground for the new trial weighed with the jury. In the present case, there is no occasion to do that. Consider what it is. It is said, there was evidence produced to prove an *alibi* on *Vere* that he was beyond sea ; and in order to lay any foundation for a new trial, it must be proved, that the verdict was obtained by surprise ; but this is destroyed by the evidence of *Walbridge*, the plaintiff's own witness, who swears, that the deponent told *Sims* that he was afraid it would be proved that *Vere* was abroad ; and this is full notice that he had reason to think *Vere* was abroad. But it may be objected, that this was a general notice that *Vere* was abroad,

(a) Attorney General v. Montgomery, 2. Atk. 378. Baker v. Hunt, 1. Vezey, 28.
(b) 1. Peer. Wms. 207. S. C. 2. Ld. Ray. 1359.

but

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but not where he was. But a clear answer arises to this from the affidavits themselves, for he swears he shipped himself in *The Triumvirate*, bound to *Cork*, and from thence to *Lisbon*; and that neither *Vere* nor *Hayman* was on board. This is the man who gave him the information; and can I be induced to believe he did not give him the full one? *Walbridge* was a witness at the trial, and was it not the easiest thing imaginable to call him in and examine him to this point? And this takes away the most material part of their case.

If this be so, consider how it corresponds with the other objection, that these new trials would be introductive of perjury; consider how many contrary affidavits have been read in this cause. But there is one thing destroys the credit of the evidence with me, and that is, that those witnesses who swear that *Vere* or *Hayman* were not aboard in *The Triumvirate*, were not themselves of the ship's crew at that time: and this shews the great practice there has been in this case.

There is a case which has been mentioned, *The Attorney General v. Montgomery* (a), last *Michaelmas Term*, in this court; but it stands on different circumstances, and was then distinguished by me. I was then aware of the inconveniencies arising from new trials, and I took notice of those relating to perjury; but what I grounded my opinion on was, that the new evidence was evidence in writing, and could not introduce perjury, and letters too in the plaintiff's hands, which he should have disclosed, and wrote by the witnesses who were examined in the cause: so that this case is no authority as to the present question.

Another reason, which has not been taken notice of at the Bar, why a new trial should not be granted, is, because this motion is for a new trial for the plaintiff at law, and he had it in his power to have helped himself: he might have been nonsuited, and ought to have made a default; and nothing is more common than to say, "We are surprized, and will not appear." It is true, at common law there cannot be a new trial on the same action, but he may bring a new one; and here he ought to have made a default; and I should not have bound him down by it, nor thought it sufficiently tried. Under all these circumstances, there is no ground for a new trial (b).

(a) 2. Atk. 378.

(b) Prec. Chan. 193.

Case 120.

— against Fitzgerald.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

AN ACTION was brought upon a policy of insurance by the trustee, the trust being declared upon the policy itself; and it was now moved, that the trustee, though a plaintiff in the action, might be received as a witness upon the trial at law.

HARDWICKE,

HARDWICKE, *Lord Chancellor*. Where policies of insurance have been made to *A.* to the use of *B.* the legal interest being judged to be in *B.* *A.* the trustee has been admitted at law to be a witness; but where the trustee has the legal estate, and the action has been brought in his name, he can never, to be sure, be admitted as a witness upon any of the principles of law. A defendant in this court, no doubt, can apply in this court to have the plaintiff's trustees examined in the cause; but I am afraid it is not so where the plaintiff comes to have himself examined, though he is a trustee. This should have been mentioned at the hearing of the cause; and then if I had been told that you must bring actions upon the policy, and should have occasion to examine the trustees, I would have directed an issue, and have given liberty to have the trustees admitted as witnesses; but I cannot do this upon motion, when the cause is out of court,

against
FITZGERALD.

IT WAS THEN MOVED, that the depositions of several witnesses examined in this cause, and now abroad, might be received as evidence at law. And his Lordship said, it was now the constant practice in the courts of law to admit such depositions in evidence, where the witnesses were abroad.

Thornhill against Evans.

Case 127.

In Chancery, Trinity Term, 15. & 16. Geo. 2.

THIS was a bill by the plaintiff to have an account of the several sums of money paid to the defendant under the pretence of principal and interest, and interest upon interest, and double interest, and to be relieved against that sort of imposition founded upon the necessities of the borrower; and also to be relieved against a grant in fee of the stewardship of a manor belonging to the plaintiff, and obtained from him by surprise.

If a mortgagee take advantage of the necessities of a mortgagor, and thereby increase the rate of interest on the money lent, and obtain the grant of a stewardship, a court of equity will afford relief (a).

The plaintiff being seised in fee of the manor of *Hebden*, in *Suffolk*, of the yearly value of seven hundred pounds, and being applied to by the defendant to appoint him to be steward of the court-leet and court-baron, answered, that he had already appointed the defendant's father to the stewardship, but that if his father would consent, he would appoint the defendant to be steward. The father consented, and a deed or instrument was drawn of the stewardship of both courts *in fee*, without the plaintiff's knowledge, being never so much as asked to make a grant in fee of it, or without any agreement or instructions given by the plaintiff about it.

S. C. 2. Atk. 330.

Before this, the plaintiff having occasion for four thousand pounds applied for it to *Mr. Evans* the father, who had been his attorney, and *Mr. Evans's* son, the defendant, advanced it; for the securing

(a) See *Ossulton v. Yarmouth*, *Moseley*, 247. *Mitford v. Featherstone*, 1. Salk. 449. *Broadway v. Morecroft*, 2. Vezey, 445.

whereof

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against
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whereof *Mr. Thornhill* executed deeds of lease and release, the money bearing interest at the rate of four pounds and a half *per cent.* Some time after, a further sum of sixty pounds was advanced by the defendant, and secured by indorsement upon the mortgage without any rate of interest specified. Ninety pounds soon after became due for half-a-year's interest, and the defendant insisted upon having that made principal; and it was indorsed to carry interest also. Upon the tenth of *November 1734*, a year's interest became due, which, together with the interest of the sixty pounds and ninety pounds, and a fresh sum of forty pounds, were made principal, not at the rate of four and a half *per cent.* but of five. Things were carried on in this way till 1738, when there was an account brought in to the amount of five thousand one hundred and ninety pounds. The plaintiff finding himself involved gave notice to the defendant, that at the end of six months he would pay him off the money due, for he purposed to sell his estate, and therefore desired the defendant to shew the title-deeds to the purchaser, who told him, he would not do it unless the plaintiff would give him double interest for the last half-year; and the plaintiff accordingly paid one hundred and ninety pounds, called "advance interest." Upon this the deeds were produced, the title looked over and approved, and the purchase-money ready on the twenty-second of *May*, the day of notice; but then the defendant said, he had business in the country, and could not come to town to receive the money. Several letters were wrote to him, and at the latter end of *June* the defendant said he would receive his money in the country, which was sent; but then he refused to execute unless he had interest until the twenty-second of *May*, the day of notice, and then interest both upon the principal and interest down to the latter end of *June*, at five *per cent.*; which was complied with, and the deeds executed.

HARDWICKE, Lord Chancellor. I am of opinion, that the plaintiff is clearly intitled to relief upon the several parts of his case.

The first and principal matter is, that of the mortgage made by the plaintiff to the defendant for four thousand pounds, with interest after the rate of four and a half *per cent.* The several points upon which relief is prayed upon that mortgage are, in the first place, to be relieved against several computations made from time to time of interest, and of turning that interest into principal, and making *Mr. Thornhill* pay for the same after the rate of five *per cent.*

In the second place, to be relieved against the sum of ninety pounds received by the defendant from the plaintiff in the name of six months interest by way of advance, and now said by the defendant to be received upon another account.

In the last place, to be relieved against the computation of interest upon interest from the twenty-second of *May* down to the latter end of *June*, when the mortgage-money was paid off.

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As to THE FIRST of these, it appears by the indorsements that computations of interest have been frequently made, and those turned into principals at the rate of five *per cent.* though the mortgage-money bears only four and a half. To justify these conversions of interest into principal it is said, and in some instances it is true, that fresh money was advanced, and that it is but reasonable to unite the fresh money and the arrears of interest, and to make them principals (a); that if a mortgagor do not pay his interest punctually, and the mortgagee demand it, it will in such case also be lawful, upon the agreement of the parties, to make such interest and principal by indorsement. And it is true it may be done, though it is always taken to be evidence of oppression, especially unless new money is advanced, or there are great arrears of interest; but here interest is made principal some time, when there was but half-a-year behind; and where a man is a great creditor, and advances new money, his interest may be commuted into principal; but whether fresh money was advanced in all the instances in the present case, does not appear to me. In two of them there was. But that which weighs particularly with me is, that here are not only agreements to turn interest into principal, but to make it bear five *per cent.* though the mortgage-money originally advanced is only at four and a half; which is a further instance of the power of the defendant over the plaintiff: and it is carefully mentioned in all the indorsements, "lawful interest." Therefore the plaintiff is entitled to relief in all the computations, and there must be an account of the principal of four and a half *per cent.*; and as to the new money advanced, it must be at five; for I cannot relieve against that, as the indorsements are under the hand-writing of the plaintiff; neither can I relieve against the interest made principal, for the same reason, but it shall only bear four and a half *per cent.*

As to THE SECOND of these, it appears, that the sum of ninety pounds was paid by the plaintiff by the name of six months interest by way of advance; and as there was nothing due, the properest name for it is "double interest for half-a-year." To justify this, the Counsel for the defendant say, that *Mr. Thornhill*, as he had made *Mr. Evans* no allowance for advancing the money, promised six months advance-interest for it when he paid him off. But this Court will relieve against such promises, for it is extortion; for *Mr. Evans* would not shew his deeds to the purchaser till he was paid it. Therefore this sum must be refunded with interest.

It is further urged in defence of this advance-interest, that *Mr. Evans*, the defendant, is a Counsel at the Bar; that he had often advised and done business for *Mr. Thornhill* without any fee; and that *Mr. Thornhill* promised him six months advance-interest for his trouble when he paid him off. It is pretty extraordinary, that six months interest should be the exact rule of rewarding. But this Court will not suffer a Counsellor who is a mortgagee to

(a) See *Sir Thomas Meere's Case*, cited 1. Atk. 304. S. C. cited *Cases Temp. Talb.* 40.

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have any such allowance for his fees. Nay, this Court will not suffer A COUNSELLOR to bring an action for his fees, for they are rather *honorary* than *mercedes*, and he must take them when he gives counsel; and no bill will lie in this court for his relief if he do not. But the present case is much worse, for *Mr. Evans* refused to shew the title-deeds till he was paid this ninety pounds. And it appears in proof, that when the title-deeds were desired to be seen, he said, nobody would advise him to part with his deeds, which were a security to him for five thousand pounds. It is said, a mortgagee may refuse, and truly, to let the deeds go out of his hands before he is paid; but no fair mortgagee will refuse suffering the title-deeds to be laid before Counsel of credit.

As to THE THIRD OBJECTION; it is insisted by the defendant, that as six months interest of the principal was due the twenty-second of *May*, he ought to have interest computed upon that six months interest from the twenty-second of *May* down to the thirtieth of *June*, when the mortgage was discharged; and the pretence is, that six months interest being due the twenty-second of *May*, was the same as a new separate sum capable of bearing interest; but if I was to allow that, I should turn interest into principal without the agreement of the mortgagor: therefore what interest has been received upon this head must be refunded with interest.

The other part of the case relates to a matter of less consequence, but it is to be connected together with the former; and that is, the appointment of the defendant to be steward to the plaintiff, dated after the mortgage; and it is for the defendant to be steward in fee, to keep by himself and his heirs, or his or their sufficient deputies, all the plaintiff's courts-leet, courts-baron, &c. in the manor of *Hebden*, in the county of *Suffolk*. This appointment in law is good as to the court-baron, for the stewardship of a court-baron may be granted to a man and his heirs, it being no judicial office, the suitors being the judges in every court-baron. But the appointment of the stewardship of the court-leet to *Mr. Evans* and his heirs is void, for it is a judicial office; and if it was to be granted in fee, it might descend to idiots, lunatics, infants, and females, who would not be able to execute it. There are, indeed, antient offices, which are judicial ones, that have been granted in fee, and yet by custom and prescription are supported; as the stewardship of the county of *Westmoreland* was granted to the *Earl of Thanet* and his heirs, and descended and came into the hands of females.

But the question in this court will be, Whether this appointment was obtained from *Mr. Thornbill* by imposition? And it sufficiently appears that it was. That *Mr. Thornbill* was a man easily imposed upon is manifest from the transaction of the mortgage. It is not pretended that he took notice of or read this appointment; or if he had, as he is a country gentleman, he might not understand it; and he might not know that this instrument was to give a man and his posterity

posterity power to act as judges in his courts; and this was subsequent to the mortgage, when *Mr. Thornhill* was under the defendant's power; and as the two *Mr. Evans's* did business for him, it was their duty to have told him the effect of such appointment.

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I THEREFORE DECREE the appointment to be delivered up to be cancelled.

Horner against Bendloes (a).

Case 122.

In Chancery, Easter Term, 15. Geo. 2. 1742.

CHARLOTTE REDMAN being possessed of fourteen hundred pounds *South-Sea* annuities, on a treaty of marriage between her and *Redman* conveyed it to trustees to the use of the husband and wife for life; and if she survived her husband, to herself for life; and whether she survived or not, she was to have a power to dispose of two hundred pounds, the remainder to the husband, his executors and administrators. The wife survived her husband, who had no children by her, and intermarried with the defendant *Bendloes*; and then she and *Bendloes* made a deed, whereby they and each of them assign and make over everything *Bendloes* and his wife enjoyed in what manner soever; but there is no recital of the power.

If a *feme-sole* having 1400l. stock convey it to trustees to the use of her intended husband and herself for life, with power to dispose of 200l. this power survives to the wife on the death of her husband.

The only question was, Whether this two hundred pounds belonged to *Bendloes*, who survived *Charlotte*, or to the plaintiff, the representative of *Redman*?

MR. CLARK insisted, that the two hundred pounds did not pass by this deed, as the deed might be fully satisfied without it; and he insisted, and cited two cases; the one determined by MR. VERNEY, the late MASTER OF THE ROLLS, and was this: *A.* having a power to dispose of four hundred pounds, and being possessed of no other fortune, made his will, and devised four or five hundred pounds, without taking any notice of his power; and it was decreed, the will was insufficient to pass the money off which he had a power to dispose. So in the case of *Tergan v. Savage (b)*, *A.* having a power to charge some property, real or personal, MR. CLARK forgot which, with five hundred pounds to pay his debts, became a bankrupt; and it was decreed by LORD KING, that the creditors were concerned, yet the five hundred pounds did not vest in the assignees, as *A.* had not executed the power.

But it was answered, and resolved by LORD HARDWICKE, that the two hundred pounds passed by the deed; that the cases cited related only to naked powers, where, to be sure, if the power be not executed, the representative can claim nothing; but the present power was coupled with an interest. And it appears to be the intention of the parties, that *Redman* shall only have the remainder

(a) This case was extracted from the manuscript of Mr. FRANCH.

(b)

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BENDLOES.

after the two hundred pounds paid. If it had been said, "the remainder over the two hundred pounds," then clearly the wife would be entitled to it; and, considering this property moved originally from the wife, it would be the surest thing in the world to decree it did not pass.

Case 123.

Smith against Wyatt and Others.

At Lincoln's-Inn-Hall, 21 July, 1742.

Potatoes are only small tithes, whatever may be the quantities in which they are sown.

S. C. 2. Atk.
364.

THIS was a bill filed by the plaintiff, as impropiator, against the defendant, the *Vicar of Westham*, for an account of the *small tithes* of that parish.

THE CASE was this: The vicarage, as well as the rectory, formerly belonged to the monastery of *Langthorn*, in the county of *Essex*. The abbot and prior received the tithes, both small and great, and by way of stipend allowed to the vicar the yearly sum of thirty-nine pounds thirteen shillings and fourpence. After the dissolution of this monastery, the appropriations devolved to THE CROWN; and his majesty *King Charles the First*, in the fifth year of his reign, by letters patent, granted the tithes of hay, corn, wood, *et decimas quascunque parcel. rectoriæ de Westham* to ———, under whom the plaintiff claims. About two years subsequent to this, a grant was made by his said majesty to the then vicar of *Westham* of all the *small tithes* belonging to the vicarage.

Upon that two questions arose:

FIRST, Whether by the first grant made the vicarial tithes passed or not?

SECONDLY, If the defendants grant be good, Whether *potatoes* are to be considered as *small tithes*? it being in proof, that no less than two or three hundred acres had been some years sown with potatoes in that parish, and no tithes ever demanded for them by *Wyatt*, the vicar, or any of his predecessors, till a little time before filing the bill.

MR. CLARK, as to the first question, insisted, that as the rectorial tithes, together with the small ones, came into the possession of THE MONASTERY, they were thereby united, and afterwards THE CROWN possessed them in the same manner; and that therefore by the words "*et decimas quascunque parcel. rectoriæ*" all tithes passed; for, says he, there can be no tithes *de jure* due to the vicar, for such must be either due by prescription or endowment, neither of which have been proved in the present case; and that all the tithes belonging to the rectory must include all those tithes which THE MONASTERY had enjoyed with it, which are both great and small ones.

AS TO THE SECOND QUESTION he argued, that *potatoes* in the present case are no vicarial tithes; that tithes are denominated great

or

or small according to their value, and that must arise from their quantity; that quantity has changed a small tithe into a great one, and *vice versa*. Hops are in their nature a small tithe, but are in Kent, and where they are planted in great quantities, esteemed a great one. Sir Simon Deggs (a) says, "all tithes of hops, &c. are accounted *inter minutas decimas*, and yet in some cases from their quantities are great tithes." The like is said of wood (b). Six acres out of twelve thousand were sown with flax; and the question was, Whether it was a great tithe? Chief Justice HOLT said, that as it was sown in a field it was a great tithe; but afterwards the other Judges, *absente* HOLT, determined, that flax was in its nature a small tithe (c), and that it was not worth their consideration, in the present case, whether it could be altered from quantity, since there was only twenty-six acres of ground sown, and that might belong to forty different persons. Peas and beans sown in gardens are small tithes; *aliter* in fields (a).

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MR. FLOYER, *on the same side*, argued, that the first grant, of the fifth of Charles the First, of tithes of corn, hay, &c. passes all tithes appurtenant to the advowson or rectory, though by the 43. Edw. 3. pl. . if the king grant a manor with its appurtenances, an advowson appendant does not pass; and there are some other cases where things will not pass in grants under the description of appurtenances: yet he said this differs from the present case; and cited *Plowden*, the *Case of Mines*, where it is said, that though the particular species is not mentioned in the grant, yet the mine passes.

AS TO THE SECOND QUESTION, he cited the case of *Alfon v. Nicholas*, where it is said, that peas sowed in rows and weeded by the hand are small tithes, but if sown *sparsim* in fields they are great ones.

THE ATTORNEY-GENERAL *for the defendant* argued, that the rectory and vicarage of *Westham*, before it became part of the monastery of *Langthorn*, was a rectory and vicarage endowed; and though there is no endowment produced, yet there has been an immemorial usage and a continual payment of the stipend to the vicars. When the advowson, at the dissolution of THE MONASTERY, became in THE CROWN, his then majesty made several grants, for the terms of twenty-one years, of the vicarial as well as rectorial tithes; and on the eleventh of June, in the fourteenth year of Charles the First, a lease was surrendered by one of the tenants of the crown, and a grant was thereupon made to the

(a) Degges' Parson's Counsellor, 197.

(b) *Udal v. Tindall*, Cro. Car. 28.

(c) *Wharton v. Lisle*, 3. Lev. 365.

4. Mod. 183. Comb. 201. 209. Carth.

263. Skin. 341. 356. 3. Salk. 349.

12. Mod. 41.

(d) 4. Mod. 184.

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vicar : since which time, the stipend has never been paid, but the vicar has enjoyed all vicarial tithes, excepting *potatoes*, and never received that tithe till now. The vicar is not only intitled by his grant to small tithes, but by usage ; and now the question is, What are small tithes ? *Bishop Gibson* says in his *Codex*, that corn, grain, hay, and wood, are great tithes. *Watson* says, that " tithes have been generally distinguished by their nature, and " not by their quantity ; and therefore corn, grain, and hay, be- " cause by their nature they are gathered in large quantities, are " called great tithes." Such things as usually grow in gardens, by their nature are usually gathered in small quantities ; and from hence comes that fixed denomination, which is not to be varied from quantity or place, of tithes growing in gardens and fields. In the case of the *Vicar of Fulham v. the Bishop of London and Others* (a), a bill was brought for potatoes, carrots, beans, peas, &c. ; the defendant insisted, that these tithes being in fields, &c. were not small tithes ; and the Court determined, that they were small tithes, excepting such which grew upon the glebe land. And the winter crops of turnips, *Trinity Term*, 12. Geo. 2. *Willis v. Paine and Underhill* (b), took from *Chief Baron COMYNS's* notes. It is true, some opinions have been, that the distinction of tithes arises not from the nature of the things titheable, but from the quantity. But in *Wharton v. Lisle* (c), the Bench of Justices being of a contrary opinion, and differing from *HOLT, Chief Justice*, he afterwards so far yielded to it as to be absent when judgment was given, which he never would have been had he continued of a different opinion. There the Justices held, that quantity made no difference ; and this, says *COMYNS*, seems to be the most reasonable opinion, because the quantity being undetermined, it would create great controversy what should be great and what small.

MR. MURRAY read a note of *BARON PRICE's*, that *hops* had been determined to be a small tithe. *Owen*, 74.

HARDWICKE, Lord Chancellor. If there had been no vicarage, all tithes had been granted ; but in this case there was one endowed, by which the vicarial were separate from the rectorial tithes ; and therefore the grant made to the plaintiff does not pass all tithes. The abbot, &c. were the appropriate rectors and vicars, for a vicarage may be appropriate to a monastery as well as a rectory, *Cre. Jac.* 516. ; and composition was made between them and the vicars for a yearly pension in recompence of tithes belonging to the vicarage ; and such compositions were very frequent before the restraining statutes. When it came into the possession of THE CROWN, there were leases made of the vicarial tithes ; which shews it was a distinct estate, and separate from the rectorial ; so that you need not speak farther to that point.

(a) In the exchequer, Hilary Term 705. (c) 3. Lev. 365. 4. Mod. 183. Comb. 201. 209. Carth. 263. Skin. 341. 356. (b) Comy. Rep. 633. Bunb. 344. - 3. Salk. 349. 12. Mod. 41.

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MR. CHUTE. This tithe is to be determined by its nature or quantity. It is in its nature a small tithe; and if quantity might make it otherwise, that may differ each year, and so be a perpetual occasion of controversy. If corn was to be sown in a garden, it would, notwithstanding, be a great tithe; so that place cannot alter the nature of the tithe. Peas and beans planted in great quantities are considered as grain; when in gardens or small quantities, they are in the nature of herbs; the case of *Bedingfield v. Freake* (a).

MR. BROWN. Tithes are small or great according to their nature (b). The nature, and not the value, makes the tithe. *Saffron* is said to be a small tithe, though of greater value than the corn in the same parish. Clover, as it partakes of the nature of hay, is great tithe; if it grow for seed, it is small tithe; and therefore it does not take its species from place. Turnips are sown in very great quantities and in fields, and yet they are a small tithe.

MR. BROWNING argued *ab inconvenienti*, that tithes must be in their nature small or great, and not to be varied by quantity and place.

MR. MURRAY read a note of CHIEF BARON COMYNS's, in which it was said, that where tithe is in its nature small tithe, it cannot be altered by the place of planting. Vetches and acorns, if not green, are small tithes; *aliter* great ones.

HARDWICKE, Lord Chancellor. I am of opinion, that *potatoes* are in their nature small tithes, and that they are not altered by quantity or place. The original distinction was from quantity, and the denomination still remains, and cannot be varied; as wood and corn, &c. were called great tithes, because there were great quantities; and so *vice versa*. When new things were introduced, it was considered what species of tithe they were most analogous to, and so were determined to be great or small tithes. In the case of *Udall v. Tindall*, in *Hutton's Reports* (c), the point was not determined, but incidentally said. In the case of *Wharton v. Lisle* the question was, Whether flax was great or small tithe? And it seems to me, that HOLT, Chief Justice, had acquiesced with the three other Judges in their opinion, for if he had not the three other Judges would scarcely have given their judgment in his absence, and contrary to his opinion upon the first hearing. As to the distinction of tithes growing in fields and gardens, that would be inconvenient, for about London a great part of the land is taken into gardens; and it would be extraordinary, that *peas*, &c. sown in ten acres of land called garden should make it small tithe, and that five acres in a field should make it a large tithe. In *Linton's Case*, garden peas

(a) Moor, 909. Goldsb. 149. Cro. 515. 2. Roll. Rep. 97. 127. Palmer, Eliz. 467. Rep. 113. 219. Watson, 392.

(b) See Ward v. Britton, Cro. Jac. (c) Hutton, 77. S. C. Cro. Car. 28.

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were planted in a field, and sown in rows, and they were held small tithes. If the rule was from quantity, it would produce great uncertainty, for things may vary by the extent of the cultivation of them; and what part of the parish sown must turn the small tithes into great, or *vice versa* the great tithes into small, would be uncertain. In a parish chiefly grazed, and very little corn sown, why, by that reasoning, would not the corn be turned to a small tithe? It may be said, that changing their manner of cultivation may reduce rectories or vicarages to little or no value; and it may be so, for tithes are a changeable, transitory, and fluctuating inheritance, and in their nature uncertain; and it is a contingency that attends all things of that nature; and that a purchaser must consider, and whether the land is likely to vary in its product or not. Admitting the plaintiff would have made potatoes a great tithe for the quantity of them, he should have shewn what proportion the ground sown bears to the rest of the land in the parish.

The bill was dismissed.

Case 124.

Clark against Peryam (a).

In Chancery, Trinity Term, 15. & 16. Geo. 2.

If a bill to set aside an annuity *pro turpi causa* charge generally that the annuitant was a lewd and infamous woman, the plaintiff may examine to particular acts of lewdness and infamy.

S. C. 2. Atk.
333.

THE QUESTION upon a rehearing of this cause was, Whether a plaintiff who comes to be relieved against an annuity *pro turpi causa* (b), and charges for that purpose in the bill generally, that the annuitant Mrs. Clarke, before Mr. Peryam's, the grantor's, being criminally acquainted with her, was a lewd and infamous woman, can examine to a particular fact, as that Mr. Abingdon lay with her before Mr. Peryam? and, Whether such particular facts must not be charged expressly in the bill, that the party may have an opportunity to controvert such charges, and thereby have proper notice, from the framing the bill, to defend herself?

MR. CLARKE argued, that if a party might examine particularly to such general allegations in a bill, no character could ever be safe, and the party charged with lewdness would have no opportunity of defending herself, or of examining witnesses to contradict such particular facts; that upon general charges against characters they ought to examine generally, as that she was a lewd infamous woman, and not give in evidence special stories of lewdness, unless they had been stated in the bill; that in the courts of law, if you are willing to take away the credibility of a witness before a jury,

(a) This case was transcribed from the manuscript of MR. SALT. MSS.

(b) See Whaley v. Norton, 1. Vern. 483. Mathew v. Hantbury, 2. Vern. 187. Bainham v. Manning, 2. Vern. 242. Spencer v. Hayward, Prec. Chan. 114. Gray v. Rooke, Cases T. T. 153.

Annandale v. Harris, 2. Peer. Wms. 432. Lady Cox's Case, 3. Peer. Wms. 339. Robinson v. Gee, 1. Vezey, 254. Priest v. Parrott, 2. Vezey, 160. Walker v. Perkins, 3. Burr. 1568. Hill v. Spencer, Amb. 641. Ex parte Cotterell, Cowp. 742.

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you cannot charge the witness with particular acts of dishonesty, because he has no opportunity to contradict them, and it would be a surprise upon him; and therefore you are only to speak in general, that he is a man of bad reputation, &c. without going into instances upon which you found your belief of such witness's dishonesty, bad reputation, &c. In the case of *Lord and Lady Doneraile*, 1735-6, *Lady Doneraile* brought her bill to have the benefit of a deed whereby three hundred pounds a-year had been given to her for pin-money. *Lord Doneraile*, the defendant, put her upon the proof of the execution, and added, if the deed was executed it was an imposition upon him, and obtained fraudulently; and further, that the plaintiff's behaviour in the point of duty and virtue to him was such as did not entitle her to relief in equity; that bill was framed like the present. *Lord Doneraile*, upon this general charge, examined several witnesses, who proved a criminal conversation, especially with one *Mr. Barry*. These depositions were read in *Ireland*, and thereupon the bill dismissed; but as no fact in relation to her unchastity was put in issue, whereby she had no opportunity to defend herself, she appealed to the lords here; and the depositions upon which the decree was founded in *Ireland* were refused to be read here, and the decree in *Ireland* reversed; and as far as one can conjecture, the opinion of THE LORDS was, that particular facts were comprised in the deposition which *Lady Doneraile* had no opportunity to object or to defend herself against. And this case was never impeached as to its authority, and is very like the present one.

MR. MURRAY argued on the same side, that the case of *Lord and Lady Doneraile* was cited by MR. CLARKE from the printed cases, which are false; and as he himself was Counsel in that cause in the house of peers here, he cited it from the pleadings themselves thus: That *Lady Doneraile* charges by her bill for pin-money, that after her marriage to his Lordship she always behaved herself with the utmost duty, tenderness, and affection to her lord; in the answer, *Lord Doneraile* denies, "that she behaved herself with duty and tenderness to him as became a virtuous woman, much less his wife." Upon this general charge, what might the party give in evidence? Why, that she did not behave as a dutiful wife or a virtuous woman. And this sort of evidence was admitted in *Ireland*. Upon appeal it was fully debated in the House of Lords here, and the evidence was refused, because characters would be very precarious, and in great danger, if such particular stories were to be given in evidence upon general allegations only, and it would be impossible to make any defence against them. That the party might have expressed particular instances of lewdness in the bill, and it would have been expunged by the Master, because they are relevant to the case, and are the very facts upon which the party founds his equity; as in *Chapman v. Blisset*, in LORD TALBOT's time (a). That in indictments, the fact must be stated circumstantially, that the party may have the best opportunity of defending

(a) Cases Temp. Talb. 145. 2. Eq. Abr. 341. 703.

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himself; and an indictment for murder generally is bad, and you cannot give the particular transaction of the murder in evidence upon that general charge. That in an indictment for barratry, the charge, indeed, is general, because barratry is a compound offence, and made up of many facts; but there the prisoner has an equivalent advantage to particular descriptions in other indictments, for he has articles delivered to him before his trial which contain all the facts that are to be given in evidence against him, and thereby he has an opportunity to defend himself.

MR. ATTORNEY-GENERAL in support of the evidence said, that the case of *Lord and Lady Doneraile* was truly stated, but the reason of reversing the *Irish* decree, and refusing the evidence of particular acts of lewdness, was, because the word "virtue" did not sufficiently put her chastity in issue, for that word is an undeterminate one, and women have many other virtues besides chastity; and that upon such a general charge *Lady Doneraile* was not obliged to understand it as any impeachment of her chastity; though it was urged, that virtue, applied to married women, must mean chastity; that none of the Counsel for *Lady Doneraile* would have thought the evidence improper, if the bill had charged her with lewdness or adultery expressly. The case of *Sydney v. Sydney* (a), heard first at THE ROLLS, and afterwards before LORD TALBOT, upon an appeal, where the decree of THE MASTER OF THE ROLLS was affirmed, was thus: *Mrs. Sydney* brought a bill against her husband to have the benefit of some marriage-articles in relation to falling timber. *Mr. Sydney* insisted, by his answer, that she ought not to have what she prayed, because of her misbehaviour and misconduct towards him as a wife; and upon this charge, *Mr. Sydney* gave in evidence acts of unchastity with two or three persons, particularly the being tumbled down a *Welsh* mountain and kissed, &c. And the Counsel for *Mr. Sydney*, in order to have this evidence read, argued, that the words in the bill were a sufficient impeachment of *Mrs. Sydney's* chastity, and put her adultery in issue. THE MASTER OF THE ROLLS, after great consideration, was of another opinion, and refused the evidence to be read. Upon this there was an appeal to LORD TALBOT, who was of opinion, the words were too general to put *Mrs. Sydney's* chastity in issue; but it was never doubted, that if it had been sufficiently put in issue, but that such evidence might have been read. MR. ATTORNEY said, he cited this from his memory only, and was not sure whether he stated the very words of the bill.

That case is not like that of a suit in the spiritual court for a divorce *à mensâ et thoro*; for there particular instances must be inserted in the pleadings. If a person bring a bill to set aside a deed for fraud generally, the plaintiff may give in evidence particular acts of fraud, without charging them specially in the bill.

(a) 3. Peer. Wms. 269. 2. Eq. Abr. 29. 728.

The case of indictments is very foreign, being for criminal prosecutions, where the party is to have all advantages, he being in danger of his life or some bodily punishment. At common law, a man may plead that he is seised in fee general, and yet may give any deeds in evidence to prove such seisin, without enumerating such deeds, and may carry his title through several descents; and the other side has no notice of this before the trial; and he may object, that if he had had notice he might have gone into evidence against it.

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Upon this re-hearing, THE COURT thought the objection to be a point worth considering of, and accordingly the cause was ordered to stand over; and at the *Seals of Lincoln's Inn Hall* after Trinity Term, 27th July 1742, his Lordship delivered his opinion.

HARDWICKE, *Lord Chancellor*. This evidence ought to be read, and it was properly done so upon the original hearing. The objection which was made against it was, that the particular fact of lewdness to which the witnesses depose, was not sufficiently put in issue by the pleadings. In order to consider this question, it will be necessary to see, what it is that is put in issue by the pleadings, what it is that the witnesses are examined to, and what is the nature of the present suit. With regard to the nature of the suit, this is a bill which is brought by the plaintiff to have a satisfaction for a bond whereby *Mr. Peryam* agreed to pay the plaintiff an annuity of sixty pounds for the life of the annuitant, not to commence however till *Mr. Peryam's* decease. And the bill is brought in order to have a satisfaction for this bond out of his personal assets. There is a cross-bill brought by the defendant, whereby it is prayed, that this bond may be delivered up, the consideration thereof being a *turpis causa*, for that *Mrs. Clarke*, the plaintiff to the original bill, was a woman of a lewd life and conversation, and that therefore this is such a bond as ought to be relieved against. The manner in which this lewdness is charged in the cross-bill is, *that Anne Clarke was a lewd woman, and of an infamous character, before Zachariah Peryam became acquainted with her*. And it is insisted on by the plaintiff in the original bill, that under this general allegation the plaintiff in the cross-bill is not entitled to examine to anything but to the general character of *Anne Clarke* concerning lewdness. The foundation of this objection is, that it is impossible for a person to be prepared to answer particular facts until they were specified in the pleadings. And the Counsel for the plaintiff have likened the present case to the general rules of law concerning examinations to the characters of witnesses or to the characters of parties. It has been said, that a general character indeed, both of witnesses and parties, persons may be supposed to be able to support, though nothing is hinted at in the pleadings, even in a general manner, against them; but that particular facts they cannot be supposed to be able to give an answer to, unless those very facts are expressly enumerated in the pleadings. But notwithstanding this objection, I AM OF OPINION, in the

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present case, that the plaintiff in the cross-cause was well entitled to examine to the particular acts of lewdness committed by *Anne Clarke*. And in order to determine this point, I shall consider the authorities upon this subject, and then endeavour to shew how they are supported by the reason of the thing. The first case of this nature is in *1. Vern. 483*. There the words of the Book are, "THE MASTER OF THE ROLLS said, that there would be a difference in these cases between a contract executed and executory; and that this Court would extend relief as to things executory, which if done it may be might stand; but as that case was, he saw no ground to relieve the plaintiff," nothing appearing to him but that it was a free and voluntary gift, without anything of a *turpis contractus*; and in case it had been so, we know that *Adam* was punished, though tempted by *Eve*, because he would be tempted. That if it had been charged in the bill, *that the defendant was a common strumpet, and commonly dealt and practised after that sort, and used to draw in young gentlemen*; in such case he thought it reasonable to relieve; and the plaintiffs had in that cause proved as much; but the defendant's Counsel opposed the reading to that matter, by reason it was not charged in the bill, nor in issue in the cause; so they prayed liberty to amend their bill, and to charge that special matter, paying the costs of that day, and of the depositions taken in the cause. By this case it plainly appears, that the apprehension of the Court and the Counsel there was, that if the lewdness of a plaintiff is put in issue in the pleadings, evidence may be given of particular acts of lewdness; for all that was insisted on there was, that the lewdness of the plaintiff was not put in issue. The next case which is proper to be mentioned is that of *Atkins v. Farr (a)*, determined in this court the twenty eighth of *February 1738*: There the charge in the bill was something to the same effect as in the cross-bill in the present case; and notwithstanding the bill was in that general manner, evidence was given of special acts of lewdness with different persons; and no objection was made to the reading that evidence: and to the like purpose is the case of *Robinson v. Cox*, determined in this court the thirteenth of *July 1741 (b)*. Another case cited at the Bar was that of *Sydney v. Sydney*. That case came first of all to be heard at the Rolls, before *SIR JOSEPH Jekyll* in 1727, who took time to consider of it, but by means of some accident or other did not give judgment in it till 1732. That was a bill brought by *Mrs. Sydney* against her husband, the present *Earl of Leicester*, in order to have an agreement carried into execution which he had entered into with her. In bar of this relief, there were two things which the defendant insisted on in his answer. The one of those was, that the plaintiff had not offered by her bill to perform her part of the articles; and the other, *that she had much misbehaved herself, and that he was forced to leave her*. The defendant entered into proof, and produced evidence that she had been guilty of adultery. On the hearing of

Sydney v. Sydney, at the Rolls, 1732.

(a) S. C. 1. Atk. 287.

(b) Ante,

that

that cause, an objection was made, that the evidence ought not to be read. His Honour took time to consider of it; and on the twenty-seventh of February 1732 he delivered his opinion. With regard to the first part of the defence which was made by the answer, he laid that out of the case, for his opinion was, that the Court might take care that she should perform her part of the agreement as well as that he should perform his. But as to the other defence his opinion was, that the evidence ought not to be read; and the reason which he gave for it was, that the answer had not put the charge of adultery in issue; for though it was sworn by the answer, that the plaintiff had misbehaved herself, and that the defendant was forced to leave her, yet His Honour said, she might misbehave herself in various ways without being guilty of adultery. This opinion of THE ROLLS was undoubtedly a right one; for certainly the charge of lewdness must be alledged in a general manner in order to let in evidence of this sort. The principal authority which has been relied on by the plaintiff in the present case is that of *Lord and Lady Doneraile*. That was a cause in the court of chancery in *Ireland*; and from the decree there an appeal was had to the House of Lords here in 1735. That was a bill brought by *Lady Doneraile* against *Lord Doneraile*, who was her husband; and one allegation in the bill was, that she had all along behaved herself with duty, tenderness, and affection, towards her lord. To this bill the defendant put in his answer, and thereby, among other things, insisted, *that she had not behaved herself with that duty, tenderness, and affection, as became a virtuous woman, much less his wife*. After putting in this answer, the defendant examined his witnesses, and proved, that she had been guilty of a criminal conversation with *Barry*. That cause came on to be heard in the court of chancery in *Ireland*, where this evidence was allowed to be read. From that decree an appeal was brought to the House of Peers here, where an objection was made, that that evidence ought not to be read; and the House was of opinion it ought not. I was not present in the House of Lords when they gave their opinion; but from what appears by the printed case, there was something to distinguish that case from the present one. For there it was alledged, that in the case of *Lord Doneraile* there was not even a general charge of adultery or incontinency in *Lady Doneraile*, the plaintiff. For there may be many other instances wherein a wife may be guilty of the want of virtue towards her husband without the act of unchastity; which circumstance distinguishes that case from the present one, for here the general charge of lewdness is expressly alledged. This is as much as necessary to be observed with regard to the authorities and precedents of the Court; and it appears thereby, that it has been the uniform sense of the Court, that it is sufficient to make a general allegation of lewdness in order to let in particular proofs of it; and if the contrary was necessary, it would be a means of having such facts inserted in bills and answers as would tend to great indecency.

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I shall,

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I shall, in the next place, consider how these cases are supported by the reason of the thing. And as to that, it seems in itself to be a thing that is reasonable, that upon such a general charge the party should be allowed to give evidence of particular acts of lewdness. By the ordinary rule of law, a prosecutor is not allowed to give evidence in support of the characters of his witnesses, unless the other side produces some evidence in order to impeach their characters. If indeed the defendant do give such evidence, that is considered as a challenge to the prosecutor to support their characters. But these rules concerning evidence to the characters of witnesses or parties hold only in those cases where the question concerning the character comes in collaterally from the evidence, and does not arise from the face of the pleadings; and where that is the case, there seems to be a very good reason why the Court should be cautious in allowing of evidence which is relative to character. But where the question concerning character does not arise collaterally from the evidence, but is pointed out by the pleadings, the objection of surprize in a great measure ceases. A case has been put at the Bar of an indictment of *barratry* found against an attorney. It has been said, that the method in that case is not to describe the particular acts which constitute the *barratry* in the indictment, but that instead thereof the prosecutor gives in articles to the defendant, containing the particular acts of *barratry* which he intends to give evidence of; and from thence an argument has been drawn, that upon such a general charge as is in the present case, the party ought not to be admitted to give in evidence those particular facts which she has done: and it is indeed true, that that is the rule relating to the indictments of *barratry*; but that is a singular case; and the foundation of it seems to be, that it is often pretty nice to distinguish what amounts to the *barratry* and what does not; and therefore, that the parties may be better prepared in order to shew what they did does not amount to it, articles of this sort are to be delivered. But that case is not like the present one; and that which shews that the reason of these articles arises from the particular nature of *barratry* is, that in other indictments which are equally general, articles of this sort are not necessary to be given: as in indictments for keeping a common bawdy-house, the charge is as general as that of *barratry*, and yet there articles of this kind are not required, and yet the prosecutor is allowed to give in evidence particular facts of persons resorting to the house for such lewd purposes. So where an issue is tried relating to a person's being *non compos*, the party is not confined to give general evidence of the other's insanity, but he may give particular acts of it in evidence. And the like rule holds where an issue is directed concerning another's being of a weak understanding; and the same of drunkenness. These things shew, that there is such a distinction which has been mentioned, *viz.* that where the charge is put in issue, though in a general manner, particular facts may be given in evidence, in order to support it; but where the matter comes in only collaterally from the evidence, it cannot. For these reasons I AM

OF

OF OPINION, that the evidence in the present case ought to be read, and the decree affirmed.

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Hall *against* Carter (a).

Case 125.

Chancery, Lincoln's Inn Hall, Seals after Trinity Term,
15. & 16. Geo. 2.

BY A WILL made in the year 1687, an estate was limited to *Thomas Carter*, son of the testator (and father of three ladies who were three parties to this suit), for life; remainder to trustees to preserve, &c.; remainder to his first and other sons in tail; remainder to trustees for one hundred years; remainder to the testator's other son *Cornelius* in like manner; with a remainder to trustees for two hundred years. The testator declared the trust of the one hundred years term to be, "that if there was no issue male of *Thomas*, and he left daughters, the trustees were, out of the rents and profits, or by mortgage, to levy and pay to the daughters one hundred pounds a-piece at the age of eighteen or marriage; and moreover pay six pounds a-year a-piece for their maintenance till the said portions became payable;" and declared in the same manner as to the other term of two hundred years. After the limitation to *Cornelius*, then there is a proviso containing a power for these sons to make jointures.

In what cases daughters' portions may be raised.

S. C. 2. Atk. 354.

Thomas made a jointure on a wife, and died without issue male; but left three daughters, and a widow his jointress.

The question was, Whether these portions are now raisable, the daughters having long since attained eighteen and been married?

HARDWICKE, Lord Chancellor. It was said, FIRST, that these portions cannot be raised so as to prejudice the wife's jointure. I allow that, but her jointure will not be hurt by its being antecedent to it. If the will had limited it to the son, and to such wife as he should marry for her jointure, there would be no pretence then that this term of one hundred years could affect it, for that would be to make a subsequent estate to affect and run over a precedent one. If that be so, it is the same thing when done by way of power; for as the son here had a power to make a jointure to take effect immediately on his death, and has executed it, it is just the same as if it had been done by the will, for it has relation to that, and so is precedent to the trustees estate for one hundred years.

2. Vern. 458.
1. Peer. Wms. 448. 707.
Amb. 335.
2. Peer. Wms. 93. 484.
1. Atk. 549.
3. Atk. 416.
3. Bro. C. C. 267. 437.

The next question is, Whether these portions are raisable out of this reversionary term? or, Whether they shall wait till that comes into possession? And I AM OF OPINION, that they are

(a) This case was taken from the manuscript collection of cases belonging to Mr. PURCAS. MSS.

raisable,

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raisable, and ought to be raised, out of this reversionary term ; for this case is plainly distinguishable from those where the Court has refused to raise portions out of reversionary terms (a). Here it is no more than this : Here is an estate in jointure to the widow, and a term of one hundred years, which will take effect in possession when she dies, for the other contingencies have happened ; and it is to raise one hundred pounds a-piece to the daughters at eighteen or marriage ; and they have attained to eighteen, and are married. In the case of *Corbett v. Maidwell* (b), LORD COWPER went upon the particular wording of the settlement, that the daughters who were to receive portions were to be unmarried or unprovided for at the father's death, and the father was then living ; so my LORD COWPER's determination was right, for all the contingencies had not happened. In the case of *Butler v. Duncombe* (c) the trust was express to raise portions after the commencement of the term ; and therefore my LORD MACCLESFIELD held, they were not to be raised in the life of the jointress. The case principally relied on is *Brome v. Berkley* (d), where there was a power to raise portions for daughters at twenty-one or marriage, by and out of the rents and profits, as by mortgage or sale, as the trustees should think fit ; and in the mean time, and until the said portions shall become payable, to raise one hundred pounds a-year for maintenance ; the portions could not be raised in the life-time of the jointress, because till her death the trustees could not make use of their election in what manner to raise it ; and the maintenance being to precede the payment of the portions, neither of them could be raised till the estate in the trustees took effect in possession ; but apply that to this case, and they are not at all alike. *Mrs. Brome* was not entitled to have any maintenance till the trustees estate came into possession ; and so it could not only not be raised, but could not incur till the estate took effect in possession ; but here it is different, for in this case the maintenance is a charge upon the estate. The trustees are to raise the portions of one hundred pounds, and moreover pay six pounds a-year for maintenance till the portions become payable. So that this maintenance is due, and is not to be postponed till the term comes into possession, or till any particular time.

I know no case where it is determined, that a term either in possession or reversion has been sold, but yet it will run on, and be a charge upon the estate. So this case is different from *Brome v. Berkley*, for there no maintenance could incur ; here it does, and is payable till the portions become payable. Then there is an objection against raising these portions by sale or mortgage of the reversionary term ; for it is said, that it must be sold to very great

(a) See *Stanley v. Stanley*, 1. Atk. 549.

(b) 1. Eq. Abr. 337. Salk. 159. 2. Vern. 640. 655. 3. Chan. Rep. 190.

(c) 1. Eq. Abr. 339. 2. Vern. 760. 10. Mod. 433. 1. Peer. Wms. 448.

(d) Eq. Caf. Abr. 340. 2. Peer. Wms. 484. 3. Brown's P. C. 437.

disadvantage, or if it be mortgaged that interest will run on; but there is the same inconvenience if it remains unsold, or be not mortgaged, for the maintenance or interest of the portions will still be running on.

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Another thing is said, that by those words "out of the rents and profits, or by mortgage," election is given to trustees, and they may do it either way. I believe this argument was relied on in *Brome v. Berkley*, but it did not turn upon that in the present case. I am not clear that the portions are not raisable by sale; "rents and profits," if it went no further, would include, for a devise of rents and profits is a devise of the lands (a). But if they be raisable either by sale or mortgage, yet it is said that interest ought not to be paid from the time the portions became payable. The proviso is, that if the remainder-man or reversioner pay the portions, the term is to cease; and from thence it is inferred, that the reversioner, *Eastcourt Carter*, may redeem the estate, and exonerate by the payment of the principal sum only. But I am of opinion he cannot without payment of both principal and interest; for as it was the testator's intention that they should have maintenance till the portions became payable, he also intended they should have interest for their portions from the time they became payable (b). In the case of *Lord and Lady Kilmarry*, in LORD HARCOURT's time (c), interest was allowed for portions, though not mentioned; and in *Evelyn v. Evelyn* (d) this case was cited and allowed.

THEREFORE I AM OF OPINION, that these several sums must be raised out of the estate, with interest from the time they became payable. And accordingly HE DECREED the maintenance of the daughters at six pounds a-year a-piece till eighteen or marriage, to be paid to the mother, who had maintained them; and that the maintenance and the portion, with interest, from the daughters ages of eighteen or marriage, be raised by mortgage or sale of the one hundred years term, as shall be most for the benefit of the estate, and be paid to them respectively, or their husbands or representatives; and the trustees have costs out of the estate, and all the rest no costs, except the subsequent costs of raising these sums, and those to be raised out of the estate.

(a) See *Okenden v. Okenden*, 1. Atk. 550.

(c) 2. Salk. 538.

(b) See 1. Atk. 548.

(d) 2. Peer. Wms. 591.

The Charitable Corporation against Sir Robert Sutton Case 126.
and about Fifty Others.

Lincoln's-Inn-Hall, 13th August 1742.

HARDWICKE, Lord Chancellor, after having taken a great deal of time to consider this case, delivered the following resolution: This was a bill brought by the Charitable Corporation against the defendants, being fifty in number; some of them as they were com-

Bill to be relieved against committee-men for breach of trust.
S. C. 2. Atk. 400.

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mittee-men and assistants or directors of the Corporation, and others as their officers and servants, and others as the representatives of them, standing in their capacities; and it is to be relieved, and to have a satisfaction in respect of divers frauds, mismanagements, and breaches of trust, charged on the defendants, by means whereof the Corporation has sustained many and great losses. As the transactions in which these frauds and mismanagements are alleged to have arisen take their foundation under a charter originally granted by THE CROWN, it will be proper to take notice, that by a charter of the twenty-second of *December* 1707, this society was incorporated by the title of "The Charitable Corporation for Relief of Industrious Poor, by assisting them with small Sums upon Pledges at legal Interest." The intent of such their corporation is properly expressed by their title; and as in all corporate bodies it is of necessity that the executive powers should be lodged in a select part of them, a committee was by the charter appointed, consisting of seven persons, who were to be invested with the management of their affairs, but subject to such restrictions as in the charter are mentioned, of which committee it is, or of the assembly substituted in its stead, called committee-men and assistants, by virtue of the by-laws of the Corporation, which by the charter they were enabled to make, that the defendants, or at least many of them, are members. By the original constitution it is provided, that the Corporation shall be enabled to raise a capital not less than twenty thousand pounds, and not more than thirty thousand pounds, for carrying on the purposes of their incorporation, which was relieving the poor by assisting them with small sums upon loans, with a power reserved to THE CROWN to enlarge their capital further: and by the charter several officers are appointed for the service of the Corporation, and among others a warehouse-keeper; and the Corporation is restrained from banking or giving out notes, except upon pledges, and even on those within the bounds of their capital. After this charter, by virtue of the power reserved, it received several subsequent enlargements of the capital by SIGN MANUAL from the crown: as in 1722 it was enlarged to one hundred thousand pounds; in 1728 to three hundred thousand pounds; till in 1730 it was enlarged to six hundred thousand pounds; which enlargements of the capital, as they were a departure from the original intent of the charter, so they were one principal handle to the abuses which have since happened. On the first obtaining the charter, it lay for some time unexecuted; but afterwards being set on foot, in *March* 1718 instructions were settled for the several officers, and by-laws were made; and among other things it was ordained, that there should be three locks upon the pledges, the key of one of them to be deposited with the warehouse-keeper, another with the cashier, and the third with the book-keeper; and no pledges were to be deposited or taken out but by using these three keys. A surveyor was also appointed, who was to attend at the warehouse every evening, and to examine the pledges, and state in his book the situation

situation thereof, viz. as to such pledges as were clearly sufficient, he was to keep one column marked (S), and as to such as were dubious a column marked (Q.). He was likewise to state the quantum of the loans on the pledges, and to sign his report, and leave it every evening with the secretary, in order to be laid before the committee; and that this officer, as well as the three locks, were intended to be a permanent and continuing check, appears not only from the nature of his office, but from the instructions of the warehouse-keeper, who was directed to permit the surveyor from time to time to make these inspections, and if any deficiency appeared in the pledges, the warehouse-keeper was to make it good: so this shews he was a material officer. But as it has been mentioned, that the nature of the committee was altered to a committee and assistants; so in process of time these rules and orders were taken away, and the cashier was directed to deliver over his key of the warehouse to the accountant. In the latter end of 1725, or beginning of 1726, *John Thompson* was appointed warehouse-keeper; and on the thirteenth of *May* 1726, the accountant was ordered to deliver over his key of the warehouse to one *Lovell*, an under servant. Whether it was ever so delivered over does not appear. On the twenty-seventh of *September* 1726, the office of surveyor of the warehouse was abolished, by which means all the checks were taken off the warehouse-keeper. On the eighteenth of *November* 1726, *Woolley* and *Warren* were appointed assistants to the warehouse-keeper *Thompson*: and it was insisted on at the hearing of the cause, on the part of the defendants, that these persons were more effectually a check on the pledges than the officers who were displaced; from whence it was argued, that no evil was to be imputed from the removal of the surveyor or resuming the keys of the pledges. But I think it does not appear the assistants were any check at all upon the warehouse-keeper, but to be considered rather as his servants, for they gave their security to him, and so were dependant upon him. From this time it is plain, the sole power over the pledges was vested in *Thompson*, *Woolley*, and *Warren*; and then the great scene of iniquity began, and the frauds that followed in the Company's affairs. The nature of those frauds as charged by the bill is as follows:

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FIRST, The renewing of pledges; that is, lending new loans on the same pledges, without repaying on the former loan, or any examination whether the pledges were to the value of the loan or not, by which means there were new notes coined for such further loan.

SECONDLY, The infamous cheat of lending, and permitting money to be lent on fictitious pledges, without any certificate of a pledge brought in; and those renewed over and over again.

THIRDLY, The issuing notes to *Thompson*, sometimes on pledges of the value whereof it was his office to judge, and so he was in fact both borrower and lender, and sometimes on fictitious pledges.

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FOURTHLY, The issuing notes of the Corporation without pursuing the necessary steps, or having the direction of the committee.

And all this arose from *Woolley* and *Warren*, the assistants, being permitted to act as brokers for the borrowers, by which means three parts in four of the loans came to be in their names. On the twentieth of *May 1726*, the court of committee took notice of this as an abuse, and that *Woolley* and *Warren* advertised that borrowers might apply to them for loans; whereupon the committee censured them, and took their words not to publish any more advertisements, and ordered, that all persons might negotiate for themselves, or by such brokers as they should think fit; yet on the eighteenth of *November 1726*, they order, that those very persons, *Woolley* and *Warren*, shall be assistants to the warehouse-keeper. And it is insisted by the plaintiff, that if the committee had not grossly neglected their trust, they must, on the shortest inspection of the books, have seen, that the practice they had just censured was, notwithstanding, kept on foot, the names of *Woolley* and *Warren* still running through their transactions for the greatest part of the loans. The account of the Corporation at the time of their failure stands thus:

		£.	s.	d.
Money lent out on pledges,	- - -	385,000	0	0
Value of the pledges,	- - -	35,000	0	0
	Deficiency,	350,000	0	0
Corporation debt,	- - -	192,900	0	0
So that the loss is,	- - -	542,000	0	0

Under these circumstances, the considerations material for this Court will be, the cause from whence this deficiency has arisen, the several acts of the defendants, their omissions and neglects, and how far they may have tended to create this loss; and whether the defendants, and any or which of them, and how far, are liable in equity to make good this deficiency. There are several persons liable to make good the losses or loans upon fictitious pledges, who are certainly liable, in case the evidence is sufficient to charge them; and that is a conspiracy called "The Partnership of Five, Four, and Three." As to this *Thompson* has been examined by the plaintiffs; and he says, that in 1726 an agreement was entered into by *Sir Archibald Grant*, *Burroughs*, *Squire*, *Robinson* (all then committee-men), and himself, that they should borrow considerable sums of the Company on fictitious pledges, and dispose of them in the purchase of corporation-shares, which they were to sell out again at an advanced price for their mutual benefit; *Sir Richard Grant* at the same time representing, that he was interested in some lead-mines, which would enable them to turn the money to good account, and to reimburse the Corporation. This association or partnership,

partnership, he says, was at first composed of those persons named before, but some of them dying or declining, it was afterwards reduced to four, and then to three; and he believes, that none of the committee knew of this partnership, except the five, four, and three mentioned. This evidence of *Thompson* has been read against the plaintiffs, and certainly might be so. But it is objected on the part of the defendants, that he being a party to the fraud, and having absconded, by an act of parliament of the 6. Geo. 2. c. 2. s. 6. a reward is given to him of one fifth share of such effects as he should discover and restore to the Corporation, and therefore he is not a competent witness. This is plainly a legal objection, and as such was admitted. But though it is a legal objection against these five persons, yet he is a good witness in regard to the plaintiff and those defendants who have thought fit to read them. However, this may be a matter proper for enquiry.

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The plaintiffs insist, that besides these partners, all those who were committee-men or assistants during this time are liable to make good the losses occasioned by these frauds and mismanagements; and their grounds are these:

FIRST, That they have been guilty of manifest breaches of trust and duty, by means of which these losses have happened.

SECONDLY, That if they are not guilty of any wilful breaches of trusts, yet they have been grossly negligent; and that this negligence in so many instances is tantamount to a breach of trust, and sufficient to charge them.

These questions will admit of various distinctions; and it will be proper to consider, what are proper to be charged as actual breaches. They are,

FIRST, The passing and signing notes without pursuing the requisites in the charter and by-laws.

SECONDLY, Passing notes on pledges, called renewing of pledges, knowing the former notes were not paid off.

THIRDLY, Passing notes for loans to *Thompson*, the warehouse-keeper.

FOURTHLY, Repealing several by-laws of the Corporation, and thereby taking off the checks upon the warehouse-keeper, and putting the whole management into his power.

FIFTHLY, Making several orders, putting their affairs in the management of *Thompson*, *Woolley*, and *Warren*, and thereby giving them frequent opportunities of committing frauds.

There were three other things insisted on at the hearing, which I did not take notice of before, because they are matters of more doubt.

FIRST, The coining and issuing notes in general.

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SECONDLY, The coining and issuing bonds.

THIRDLY, The contract with *Robinson* to become their banker and circulate their notes.

NOW, as to the coining notes in general, power is given to do it by the charter, and it is only the *quantum* and ill application of them that creates the mischief. So as to the bonds : Indeed there is no express power given by the charter, but a Corporation may give bonds ; and it is the frequency of them that creates the evil. And in like manner of the contract with *Robinson*. The mischief from thence arises from variety of circumstances, the consideration of which it will be proper for me to reserve till after the enquiry which I shall at present direct.

As to the first three things, I AM OF OPINION that they are clear breaches of trust.

FIRST, The passing notes without pursuing the requisites in the charter and by-laws, by which they are to be subscribed by one of the committee-men, which was intended as a check on the cashier ; if they are not so subscribed, it is a breach of trust.

SECONDLY, As to passing notes for renewing of pledges ; if the value of the pledge was not certified, it is an express breach of trust, for it was lending double, treble, or four times the sum, on the same pledge, and exceeding the value of it.

THIRDLY, The passing notes to *Thompson* was a most extraordinary piece of fraud or gross negligence, for it was giving him the power of valuing his own pledges, and making him both borrower and lender ; and where that happens, those who suffer it ought to be answerable for it.

THE FOURTH and FIFTH are of a more doubtful nature. It is certain they have tended greatly to the injury of the Corporation, but it is to be considered whether they are actually breaches of trust. They will principally affect those only who were present and concurred in such measures ; but how far others have made themselves liable by acting under those orders, is a consideration under the head of neglect only ; and certainly it was a gross neglect.

The particular charges under the head of neglect are :

FIRST, Non-attendance on their employments.

SECONDLY, Not observing the orders for balancing the cash.

THIRDLY, Not observing an order of the twentieth of June 1726 for laying accounts of forfeited pledges before the court of committee.

FOURTHLY, Not once inspecting the warehouse.

FIFTHLY, Suffering the several bad orders for taking off the checks to subsist and permitting *Thompson*, *Woolley*, and *Warren*, to act under those orders.

From

From hence an accumulated charge is formed against all the defendants who were committee-men or assistants, by which it is said, they are liable to make good the whole loss sustained by means of fictitious pledges.

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It will be proper here to consider the employment of a director or committee-man. It is a mixed office, partly in the nature of a public office, and partly as a private office in trust for other people. It is public, as it rises under a charter, and as the abuse of it tends to affect public credit. But as it does not concern public government, but the negotiation of private property, it is therefore a private office, like the directors of the *Bank, South-Sea*, and other trading Companies; where they are not obliged to qualify by taking the sacrament and oaths as for a public office, but are only intrusted with the property of the aggregate body: so this is in the nature of a private trust for other persons; and in this view the committee-men are responsible to the Corporation for breaches of trust, either by commissions or omissions, for acts of malefeasance or nonfeasance; and at the hearing *Domat (a)* was cited to shew they are responsible for breaches of private trust. There is no doubt but the three first-mentioned breaches are such for which they are responsible; but whether the others, of repealing the by-laws, and making new orders, and how far they shall be called breaches of trust, deserves consideration. The events do oftentimes shew, that the proceedings or omissions of persons acting in this capacity are of evil tendency; yet it would by no means be just in a judge to determine from events that have happened that they might be foreseen, because if so, nobody would accept the direction of corporate affairs. But when there is a series of neglects, and breaches of trust are occasioned by their absence, then they are answerable for the malefeasance of others. How far the particular circumstances of the several defendants may bring them within these reasons, I shall not at present examine, the cause not yet being ripe for that purpose.

To the relief prayed by the plaintiffs two objections have been made by all the defendants, the committee-men and assistants.

FIRST, That they had no salary for the execution of their offices, and so ought not to be bound to strict rules of judgment, as between ordinary parties in questions of property. As to this, there is certainly no weight in it, for if one voluntarily accepts a trust, he must execute it with fidelity, integrity, and diligence; and where no allowance is annexed to the trust when created, this Court will not make any. To this effect is the case of *Coggs v. Barnard (b)*, where one undertook to remove an hoghead of brandy out of one cellar and lay it in another, and by his negligence it was staved; though he had no reward, yet HOLT, *Chief Justice*, held him lia-

(a) Domat's Public Law, lib. 2. tit. 3. f. 1, 2.

(b) Salk. 26. S. C. 2. Ld. Ray. 909. S. C. Comy. Rep. 133.

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ble (a); and in case of public directions, even where salaries are annexed to them, it is perhaps pretty generally understood, that persons who accept these offices are not incited to it from the salary, which for the most part is small, but have other advantages in trading Companies.

THE SECOND objection was, that the nature of this case is such as it is impossible for the Court to decree for the plaintiffs on this general point of breaches of trust and gross neglects of the several directors, for that some acts are joint, others separate, and each is answerable only for his own particular acts and neglects; and from thence there is a general inference, that this case is so complicated, and of such a nature, as is out of the jurisdiction of any court of equity. If this be so, it is laying the axe to the root of the tree, and I have been stating all this to no purpose. But it is not so; for where there are many trustees, and some are guilty of one breach and some of others, or where there is a gross negligence, and the loss is so complicated as it cannot be apportioned, I think they are all jointly liable. And I will never establish this, that breaches of trust, or any matters of fraud, are above the reach or out of the jurisdiction of this court. The king's courts are to redress every wrong and protect every innocent person; and if the laws do not extend to do this, new and more ample ones will be provided, for two mischiefs are to be avoided: first, not to make it unsafe or too perilous for honest men to accept offices of trust, by making them liable to losses in the execution of them; and secondly, to prevent the frauds of dishonest men in such employments. Therefore at present, as far as I can be certain, I will determine, that the conspiracy called "The Partnership of Five, Four, and Three," are answerable in the first degree; but as to the others, I shall not now determine how far they are answerable, but at most it will be only in the second degree: and this method I took in a similar case that was before me the twenty-eighth of May 1739, *The Lead Company v. Hall*, their treasurer. Their bill was for a satisfaction in respect of frauds committed by *Hall*, and connived at, or assented to, or acted under by the directors; and I held *Hall* to be first liable, and if he proved deficient, then the directors. So here I AM OF OPINION, that if it appears any others of the directors, committee-men, or assistants, are liable, it will be only in the second degree, and upon the deficiency of the partnership.

Therefore I DECREE, that against *Adam Sorebery* and *Jane* his wife, as she is the representative of *Sir Fisher Tench*, the bill be dismissed, there having been a decree in another suit of the same

(a) But see the case of *Shields v. Blackburn*, where it is determined, that if *A.* a general merchant, undertake voluntarily, and without reward, to enter a parcel of goods for *B.* together with a parcel of his own of the same sort, at the custom-house, for exportation, but makes the entry under a wrong denomination,

whereby both parcels are seized; *A.* having taken the same care of the goods of *B.* as of his own, not having received any reward, and not being of a profession or employment which necessarily implied skill in what he had undertaken, is not liable to an action for the loss occasioned to *B.* 1. H. Bl. Rep. 158.

matters

matters; and as against *Aynsworth* and several others it be dismissed with costs; and as between the plaintiffs and other defendants, declare, that the principal question is, Whether the defendants, who are committee-men and assistants, and their representatives, or any and which of them, are liable on the head of breach of trust or negligence to make good the losses sustained by the Corporation? And it being sworn by *Thompson*, that there was such partnership as before stated, in fraud of the Corporation, I declare my opinion, that in case that fact be true, the parties thereto are originally, and in the first place, answerable; and if I should determine that any other of the defendants are responsible, it will be only in the second degree, in default of the others. Therefore I refer to THE MASTER to examine into and state the nature of the said partnership, with the time when, and for how long, they were subsisting, and all material circumstances relative thereto.

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I DECLARE, that such of the committee-men and assistants as signed notes to *Thompson* are responsible, and the loss is to be made good by them: that such also as signed notes without pursuing the rules and directions of the charter and by-laws are responsible, and the loss is to be made good by them. And let THE MASTER enquire into and certify these matters, and also who did sign the said notes; and take an account of the losses sustained thereby, and also of losses arising from renewing pledges or fictitious pledges: and by whom the notes for those were signed; and whether this appeared or was known to the committee, or which of them: and let him enquire into and certify the value of the pledges, and what damage the Corporation have sustained: and let the committee-men and assistants, and all necessary parties, be examined upon both, and produce books and papers as the Master shall direct: and let a proper representative of *William Aylmer*, late a committee-man, be brought before the Court: and as to all parties, except as to those against whom the bill is dismissed, let costs be reserved.

Ex parte Phelps, a Lunatic (a).

Case 127.

Lincoln's-Inn-Hall, Seals after Trinity Term, 15. & 16. Geo. 2.
1742.

THE LUNATIC'S FATHER devised to him an estate in fee-simple, and a leasehold estate, and appointed a trustee for the care of the lunatic, who renewed the lease for the benefit of himself, and not of the lunatic; and he was afterwards appointed committee of his estate by the Court.

If the trustee of a lunatic renew a lease for his own benefit, it is a breach of the trust.

HARDWICKE, *Lord Chancellor*, declared, that if these facts were so, which he referred to THE MASTER to enquire, this was such a breach of trust, though before he was appointed committee, that he ought to be discharged, and another appointed.

(a) This case from MR. PURCAS.

A a 3

Stanhope

Case 128. Stanhope against Cope and Others, Executors of Spinks (a).

Lincoln's-Inn-Hall, December 14, 1742.

In what cases a court of equity will decree the redemption of an annuity.

S. C. 2. Atk. 231.

SIR WILLIAM STANHOPE, a young gentleman of a very great estate for life, having run considerably in debt by gaming and other extravagance, in June 1727 borrowed of one *Spinks* eight hundred pounds, and granted him for this money an annuity of one hundred pounds a-year for the life of *Sir William*; in which grant there was a proviso, that *Sir William*, at any time within three years, might redeem this annuity, on the payment of the arrears that should be due, and fifty pounds more, and giving him half-a-year's notice; and there was also a covenant, that *Sir William* should sell *Spinks* two annuities more of the same sort on the same conditions, one on the thirteenth of September, and another on the thirteenth of December following. On the twelfth of September he granted *Spinks* a joint annuity of three hundred pounds, on the cancelling and delivering up the former covenant and grant, and on paying *Sir William* one thousand pounds more; and on the thirteenth of December 1727, this was changed into an annuity for the life of *Sir William* on the payment of four hundred and fifty pounds more; so that the whole sum borrowed was two thousand two hundred and fifty pounds; and in the last grant there was a clause, that *Sir William* might redeem this annuity within three years, on the payment of the principal, and the arrears of the annuity, and one hundred and fifty pounds more. The plaintiff paid this annuity till 1736 without complaint; and then he offered to redeem it; which *Spinks* refused; but there was no legal tender of the money; and *Sir William* brought this bill against *Spinks* to be relieved; which was continued and commended against the present defendants, his executors.

And on the part of the plaintiff it was urged, that if this was not within, it was at least an evasion, of the statute of Usury, which the law or equity never allowed of. It was also compared to oppressive and fraudulent bargains made with young heirs, which, though LORD NORTH seemed to be at first of another opinion, are now always relieved against; and the case of *Nott v. Hill* (b), *Beake v. Wiseman* (c), *Twisleton v. Griffith* (d), and the *Earl of Arglais v. Muschamp* (e), were cited (f); and a saying of LORD TALBOT's, in the case of *Bosanquet v. Dashwood* (g), "that though there is not such fraud as is properly called cheating, yet if any corruption appear, and the bargain is oppressive, he would relieve."

5. Co. 69, 70.
Cro. Jac. 307.

(a) This case was taken from the manuscript of Mr. GORE.

(b) 1. Vern. 167. 2. Vern. 27.

(c) 2. Vern. 121.

(d) 1. Petr. Wms. 310.

(e) 1. Vern. 237.

(f) See also *Cole v. Gibbons*, 3. Peer. Wms. 290. *Chesterfield v. Jansen*, 1. Atk. 342. *Barnardiston v. Lingood*, 2. Atk. 133. *Gwynne v. Heaton*, 1. Brown's Ch. Rep. 1.

(g) Cases Temp. Talbot, 38.

MR.

MR. MURRAY, for the plaintiff, said, he would not now argue whether the plaintiff might redeem or not, for it seemed to him a clear point; and what he should offer on the other point would conclude *à fortiori* to that; but the doubt was, whether *Sir William Stanhope* was not entitled to redeem on the payment of principal and interest only, and the defendant to account for what he had received; that he would lay it down as a rule, that no security should stand for more than the principal and interest, if the person giving that security was in such circumstances as would compel him to enter into any security, however unreasonable, and if those circumstances were so general as to make it a public inconvenience. That it was merely for that reason that marriage brokerage bonds were void, though the parties married were of equal quality and fortune. So where young gentlemen who have estates in expectancy come into securities of this sort, let the contingency be what it will, this Court relieves against it; as in the case of *Kerwin v. Milner (a)*, determined by LORD KING, viz. *Mr. Kerwin*, a very sickly young gentleman, and going abroad in the army, being entitled to a good fortune, both on the death of his wife's father and his own, one of whom was eighty and the other fifty-nine, borrowed five hundred pounds of *Milner*, and gave a bond of one thousand pounds on the death of either of the old gentlemen; and though the money was paid on the bond, yet LORD KING relieved against it, without obliging *Kerwin* to pay costs. That this bond was set aside on the general rule, for *Kerwin* was of full age, and solicited the bargain himself; and that all these cases have gone on rules of public policy, that men may not spend their estates before they have them; and it is the same thing whether they come to them by way of remainder or descent. So bonds given to lewd women are set aside, because men in those circumstances are likely to come into bad terms; and this is, or may be, the case of many persons. For this general reason, though there is no mixture of fraud, bonds got by attorneys from their clients pending the suit only stand as a security for the payment of principal and interest; as in the case of *Proof v. Hinds (b)*, where *Proof*, a very poor man, and suing for a considerable estate, gave *Hinds* an absolute bond of one thousand pounds; and on interrogatories it appearing the consideration of the bond was *Hinds'* assisting *Proof* in the carrying on a law-suit, LORD TALBOT, and THE LORDS on appeal, were of opinion, the bond should only stand security for what *Hinds* really deserved, and his trouble was worth. So in the case of *Walmsley v. Booth (c)*, determined on the strength of the former: viz. *Japhet Croke*, under a prosecution for forgery and perjury, not being able to prevail on any one to be bail for him, *Booth*, an attorney of the court, procured him bail, but obliged him first to make his will and leave him a legacy of one thousand pounds, and then to give a bond of the same sum not to revoke it. *Croke* revoked the legacy, and *Booth* suing *Walmsley*

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2. Vern. 84.
Eq. Abr. 313.
pl. 15. 14.

Hall v. Pin,
Shower's Parl.
Cases, 76.
Duke of Hamilton v. Lord Mo-
hun, 1. Peet.
Wms. 118.

(a)

(b) Cases Temp. Talb. 111.

(c) 2. Atk. 25. 2. Eq. Abr. 697.

Bar. Chan. 475.

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his executor, on this bond, *Walmsley* applied to chancery, and on very great consideration was relieved, and the bond decreed to stand only as a security for what *Booth* really deserved. And on this account only, LORD TALBOT relieved against a bond (a) by which the obligor bound himself to pay the obligee part of the profits of the office for his interest in procuring him the place, though there appeared no fraud, and the sum to be paid was so small that the obligor made an advantageous bargain. That the present case was plainly within those general rules, for almost in all marriage-settlements the husband is tenant for life; and he believed the estates of most of the great families were now mouldering away under these annuities. That on the part of the plaintiff, the money was borrowed to feed a present extravagance, which perhaps he would have cured himself of had he not got the money, and had time to recollect; and he told the story of a noble *Venetian*, who cured his son of extravagance by only putting him to the trouble of counting the money which he gave him. But that this case did not stand in the general rule alone, but was infected with circumstances of imposition; for *Sir William Stanhope*, when he came to his estate, which was seven thousand pounds a-year, was but nineteen, and before he was twenty-five had reduced himself to such circumstances as to be obliged to borrow on those unreasonable conditions; and it appeared he entirely trusted to and was in the hands of one *Rogers*, *Mr. Spinks'* agent. That the condition of the grant shewed imposition, for there is a covenant to grant two other such annuities; and that though this covenant was only in the first deed, yet it run through and vitiated them all. That the circumstance of redeeming was a corroboration of this remark, for why should the plaintiff have it inserted if he did not apprehend he had a hard bargain? and why should the defendant's testator require a premium for doing it unless he was certain he made a good one? That it appeared to be *Mr. Spinks'* business to deal in and ruin young gentlemen by these annuities; for that *Rogers*, one of his agents, dealt for him in no less a sum than two thousand pounds a-year. That if it be objected, that the money is all paid on the annuities, the true answer is, that where the money is received in consequence of an usurious or oppressive agreement, the Court cannot give complete relief without ordering an account; and that in the case of *Kerwin v. Milner* the money was all paid.

MR. ATTORNEY-GENERAL *on the other side*. There were four points the plaintiff's Counsel insisted on in order to their relief.

FIRST, That this grant was obtained by imposition.

SECONDLY, That it was in the nature of a mortgage.

(a) *Law v. Law*, Cases Temp. Talb. 140. 3. Peer. Wms. 391. 2. Eq. Abr. 387.

THIRDLY,

THIRDLY, That it was usurious; and

FOURTHLY, That the plaintiff was at least entitled to redeem on payment of principal and interest.

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That as to the first head, there was no evidence read of any imposition, or even of *Sir William Stanhope* being in distress, and that his acquiescence so long was a strong presumption to the contrary; that though it might be true he employed no other person but *Rogers* to transact this matter, yet it was proved he applied to *Rogers* first; and that it would be very hard to overturn a purchase because a person did not take proper advice about selling his estate.

That it was said there was oppression on the face of the deed, because the covenants on the first deed were not mutual; for *Sir William* was obliged to sell, though *Spinks* was not to buy; but the whole deed must be taken together, and every part of it as a consideration for the other part; and that the eight hundred pounds was the reason here why the defendant had his option of purchasing more annuities; as in a lease it is common to give the lessee a liberty of renewing, without the lessor's reserving a power to oblige him to renew: but that this deed, being cancelled, was now out of the case.

That this was not at all like the case of contracts made with, or bonds obtained from, young heirs: that the true reason why such contracts were not binding were, first, because the party who made them had only a reversionary interest, and because he was at that time probably in distress; but secondly, and chiefly, to preserve the obedience he owed his father by keeping him dependent on him; which reason, as well as the former failed here, *Sir William Stanhope* having no father, having a present estate, and it is not proved he was in distress.

Nor does this bear any similitude to marriage brokerage bonds; for the true reason of laying them aside is, because the consideration is a *malum in se*, as bonds given to lewd women are void from the *turpis causa* which is the consideration of them.

That the arguments drawn from public convenience could be of no avail here, because they laid down no certain rule where these purchases are binding, and where not; that it would be very hard to decree, that a tenant for life should not sell all or any part of his estate on any occasion whatsoever; and that though probably he was in distress when he made this grant, which was a sale *pro tanto*, yet it was more reasonable he should do so than to be sent to gaol; that these annuities being usual and common was the strongest argument against the plaintiff, because a decree for him would unhinge and disturb the properties of many persons whose only support these annuities were, and who might have purchased them fairly, and for valuable consideration.

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That if it was a mischief, it should be remedied by act of parliament, which could only affect future grants, and not by a decree, which would be a precedent to overturn and influence former ones.

That though the rule laid down about mortgages, that once a mortgage always a mortgage, was a very true one, yet it had no relation to the present case, which was a purchase; for though the word "redeem" was properly used in mortgages, yet it would not constitute one contrary to the intention of the parties and the plain meaning of the contract taken all together.

Cro. Jac. 253.
Noy, 151.
2. Lev. 7, 8.
Cro. Jac. 208.

That this could not be usury, because the lender run a considerable risque; and by the cases in the margin, the purchasing an annuity at an under value is not usury.

2. Vern. 84.
Eq. Abr. 313.
pl. 15. a strong
case that there
should be a re-
demption; and
upon payment
of principal and
interest only;
and to account
for the annuity.

That though the gentlemen insisted *Sir William* might redeem on the payment of principal and interest, yet they had used no argument, nor cited any case, to prove he might redeem at all; that this being a purchase, the plaintiff had no right to re-purchase but by the contract; and that the time in which he was to do it was very material; and then this Court would never relieve if the time was lapsed.

As in the case of *Wheeler v. Lord Foley*, determined by LORD HARDWICKE, viz. *Lord Foley* made a lease for three lives, in which there was a clause, that if any of the *cestuy que vies* died within a year, he would renew on the payment of one hundred pounds. Two of the *cestuy que vies* died within the year, and after both their deaths the tenant requested *Lord Foley* to renew, which he refused to do, because the request was not made before the death of the second, who died within a month of the first; but on application to chancery he was compelled to renew; though LORD HARDWICKE declared, had the time been lapsed he would have decreed otherwise. As in the case of *Allen v. Hardison*, decreed also by LORD HARDWICKE, which was in a covenant in a lease of coal-mines, that the lessor would grant the lessee a new lease on his request within a certain time; the time lapsed, and within a month after the expiration of the term the lessee applied for a new lease, which the lessor refused to grant him; and the Court would not relieve him, because the time was passed, though the lessor permitted the lessee to continue his possession after the lease was expired.

He also said, that the plaintiff's acquiescence was a confirmation of it; as in the case of *Standard v. Metcalfe*, where *Metcalfe*, being guardian to a young lady who had a good real estate, persuaded her, as soon as ever she came of age, to settle her estate, and put him in remainder. She then made her will, by which she confirmed this settlement, and afterward became a lunatic; and on
a bill

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a bill brought by her committee, the Court refused to relieve, because the settlement was confirmed by the will.

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HARDWICKE, *Lord Chancellor*, said, he had a great aversion to contracts of this kind, and would always relieve against them when it was in his power; that in the present case, on all he had yet heard (for the Counsel had not all finished), the only doubt with him was, what relief the plaintiff should have, whether he should be allowed to redeem on payment of principal and interest from the time of the loan, and an account decreed, or to allow the payment of the annuity till 1736, when *Spinks* refused to reconvey, and interest from that time, which he seemed most inclined to do; but that this being the first case of this nature, and a very doubtful one, he recommended it to the parties to agree, which they did, *viz.* to pay the principal money advanced, and the arrears of the annuity to *Midsummer* 1736, and interest from that time to the decree of redemption (a).

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2. Vern. 84. a
strong case to
that purpose.
Vide 1. Vern.
476, 477. 183.
394.

NOTE, The Lord Chancellor said, that the plaintiff's evidence was very difficult, as not proving that he was in distress when the bargain was made; which had he done, it would have altered his way of thinking about the matter.

(a) The compromise was on the following terms:—The money already paid into court to be applied, in the first place, to clear the arrears of the annuity to *Midsummer* 1738, and the surplus towards the payment of the 2250*l.*; and what it

shall want of clearing the whole principal advanced to be paid in two months, but no interest from 1738 to the present time. Reg. Lib. 1741. fo. 86. S. C. 2. Atk. 235.

Stringer against New.

Case 129.

In Chancery, Michaelmas Term, 15. Geo. 2. 1741.

HARDWICKE, *Lord Chancellor*, delivered the following opinion. THIS CASE comes before me by way of exception taken to the defendant's plea. I was of opinion last night, that the plea should be allowed, and I have since looked into some cases which have confirmed me in that opinion; and they afford stronger reasons why this plea should be allowed than I last thought of; for I had then some doubt with myself as to the operation of the fine.

Descent.

THE CASE is thus:

A. being tenant for life, with remainder to trustees to preserve, &c. remainder to his first and other sons in tail, remainder to the heirs of his own body, remainder to the right heirs of his father the deviser, had a sister of the half-blood, who was a daughter of his father by a former *venter*; and he had also a sister of the whole blood.

THE QUESTION is, Whether *A.* had made any alteration as to the descent of the reversion in fee? If he had not, it would descend to the sister of the half-blood, who was the elder daughter, and equally

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equally heir to the father with the other daughter. But if he had altered it and given it to himself, it would descend to the sister of the whole blood, who claims as heir to her brother, who was last actually seised; and therefore she is entitled under that known rule of law, that "*possessio fratris de feodo simplici facit sororem esse hæredem.*"

But then it is certain, that must be an actual possession; so that it is argued in this case, that this being an estate for life in *A.* with a remainder in tail and a reversion in fee expectant, this is not such a possession as will intitle the younger daughter to take under a *possessio fratris*.

What was insisted upon on the other hand in order to have altered the course of descent, and given it to the heirs of *A.* instead of the heirs of the father, is, that *A.* had made a lease and release, and thereby conveyed the estate to *B.* on trust for the payment of debts, &c. and levied a fine thereof, but had not suffered a recovery.

And the question is, Whether this fine has changed the reversion in fee, and thereby altered the descent?

And I AM OF OPINION, that it did alter the reversion, and that therefore the estate will go to the right heirs of *A.*: and I found my opinion on two cases in *Co. Lit.*; the first of which is 15. a. where he says, "If a man has issue a son and daughter by one *venter*, and a son by another, and die, and the eldest son enters and dies without issue, the daughter shall have the land by a *possessio fratris*, and not the younger son; but if the elder brother after his entry endows the wife of his father of a third part, and dies without issue, the younger brother shall have the reversion of the third part, because the actual seisin which the elder got by his entry is defeated by the endowment. But if the elder had made a lease for life, and died, and lessee had endowed the wife, and tenant in dower had died during the life of the lessee for life, the sister, as heir to the elder brother, should have had the whole, because by the lease for life he had altered the reversion: for in the first case, the seisin being defeated as to a third part by the endowment, the reversion thereof depended on the estate which the wife was in from the husband; so that in judgment of law a reversion only descended; but in the other case, the reversion was changed and altered by the lease for life, and is therefore expectant on a new estate for life."

The other case is *Co. Lit.* 191. where it is said, "That many times the change of the freehold makes an alteration and change of the reversion; as if tenant in tail or husband seised in right of his wife, or tenant for life, make a lease for the life of the lessee, in all these cases the lessor does gain a new reversion by wrong." "And if the elder brother grant a reversion expectant on a freehold for life, it shall cause a *possessio fratris*." From all

all which cases it appears, that from any such change in the reversion it shall descend to the heir of the son, and therefore entitle the younger sister of the whole blood to claim as heir to him by a *possessio fratris*.

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In the present case, the conveyance is by lease and release to B. to pay debts, &c. : and surely this is a great alteration, for this amounts to a grant of his estate for life ; and it likewise passes the reversion in fee ; for as he was right heir of his father, he had a reversion to grant, though it would descend to the right heirs of the father without such an alteration ; and though the estate was subject to redemption on payment of the debts, &c. yet it would follow the heirs of the son, because the son had changed it, and made it his own by a plain alteration.

Now I shall consider what would be the effect of this fine, supposing the lease and release out of the case ; and that fine would certainly have barred the remainder in tail in himself, for he was seised for life, with remainder to the heirs of his own body ; so that the fine barred the estate, and would have amounted to a grant of the reversion in fee, if to a stranger. Now this reversion in fee, instead of being expectant on the estate-tail, as by the devise it was, does now depend on an estate on contingency.

Therefore on this case, whether the reversion being thus changed shall alter the descent of it, so as to go to the heirs of the son, I am clearly of opinion, that it is literally within what was laid down in *Co. Lit. 191. b.* that if the elder brother change the freehold, it shall alter the reversion likewise, and shall cause a *possessio fratris*. In the present case, I think, that both the conveyances have changed the reversion, and therefore the estate will descend to the defendant as heir of the whole blood to the brother, and am therefore well satisfied in allowing this plea.

Montgomery against The Attorney-General.

Case 130.

In Chancery, Michaelmas Term, 15. Geo. 2. 1741.

HARDWICKE, Lord Chancellor, delivered the following opinion. THE QUESTION is, Whether some letters shall be allowed to be read ? And the case by which the question is introduced is this : The plaintiff is heir at law of the testator ; and the question arises upon the sanity or insanity of the testator at the time of making his will, on which the validity of it depends.

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the court of
chancery will
allow letters to
be read.

It seems, after the death of the testator a bill was brought in the name of THE ATTORNEY-GENERAL, at the relation of the devisees, in order to establish the will and to have the trusts executed, in which the heir at law was made defendant. And this Court directed an issue at law to be tried of *deviseavit vel non*, which depended on the validity of the will ; and a verdict was thereupon given in favour of the will. Whereupon application

was

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was made for a new trial; but WILLES, Chief Justice of the Common Pleas, certified, that he was satisfied with the verdict, so that the new trial was refused; and then this issue being tried, a decree was made on the equity reserved.

The trial of this issue was in *Trinity Term* 1738, and the decree made in *Michaelmas Term* following. After which, in the same Term, the now plaintiff brought an ejectment in order to recover the premises; but on this a new information was brought by THE ATTORNEY-GENERAL; in the nature of a *supplemental bill*, for a perpetual injunction to stay proceedings at law. This came to be heard in 1740, and a decree for a perpetual injunction was accordingly made. Since that, the plaintiff brought a new bill, in the nature of a *bill of review*, and applied to the Court to have the original cause heard, and the decree for the perpetual injunction reversed; and the reason he founds this application on is, because since the trial and decree he has discovered new evidence to shew the insanity of the testator, which was not in his power to have produced before, and such as he thinks would have induced the jury to have found a different verdict; and therefore he prays that a decree for a perpetual injunction may be reversed, so that then he may have a new trial. This evidence, it seems, consisted in letters which were in the custody of the defendants. So that the question now is, Whether these letters should be admitted to be read anew proof in this bill in the nature of a bill of review? To the admission of them several objections have been made: FIRST; That it is not shewn that they were first discovered and came to his knowledge after the first decree in *Michaelmas Term* 1738. SECONDLY, Supposing they did since the first decree, yet it is plain it was before the decree for a perpetual injunction; which is sufficient to induce the Court not to admit the reading of them now, because they might have made use of them in order to have prevented that decree being made. Now though this bill is called a bill of review, yet it is only in the nature of a bill of review, and not strictly one, because the decree is not enrolled; yet I must consider it as if it was really one, and therefore must reserve the same rules as are laid down concerning bills of review. The original rule that is laid down by LORD BACON (a) is, that no decree shall be reversed, altered, or explained, being once under THE GREAT SEAL, but upon bill of review; and no bill of review shall be admitted, except it contain either error in law appearing in the body of the decree without further examination into matters of fact, or some new matter which hath risen in time after the decree; and not any new proof which might have been used when the decree was made. Nevertheless, upon new proof that is come to light after the decree made, and could not possibly have been used at the time when the decree passed, a bill of review may be grounded by the special licence of the Court, and not otherwise. So that on this rule three things are to be considered: FIRST,

(a) Lord Bacon's Ordinances in Chancery, printed in his Law Tracts, page 279.

Any error in law appearing in the body of the decree. **SECONDLY**, Some new matter which has risen in time after the decree ; so that the second does not take in this case as being new matter, &c. ; and so is the case of *Whorehood v. Whorehood (a)*, where the wife brought her bill for alimony upon her husband's having left her ; and there was a decree, that the husband should pay her so much a quarter. Afterwards the husband brought a bill to stop the allowance, upon a suggestion, that he had offered to take her home to him, and she had refused to come ; whereupon the alimony was stopped. But this was not properly a bill of review according to the descriptions in those rules, but rather in the nature of an original bill. So that in the present case this is not properly new matter, but it is new proof of that matter which was before alledged, *viz.* of the insanity of the testator, which was originally the defence, and therefore is new proof of that matter, and which could not possibly have been used at the time of the decree. And I have seen a manuscript of LORD NOTTINGHAM's, with his own notes on *Bacon's Rules*, where he adds of his own, that this new matter must be such of which the party could not have advantage at the time of the decree. And agreeable to this rule is 1. *Chan. Rep.* 43. where, after laying down a rule, that nothing is a ground for a new trial after judgment that is not a ground for a bill of review, it is said, "nor is the want of evidence of matters which might have been used in the first cause, and of which the party had then knowledge, any ground for a bill of review." These therefore being the rules to be observed in bills of review, it is necessary now to consider how far the present case corresponds with them.

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THE FIRST OBJECTION as to allowing this evidence is, that the plaintiff had not shewn that these letters came to his knowledge since the first decree. It is admitted by the answer of the defendants, that it was after the trial at law ; and the plaintiff has sworn by affidavits, that in *February* 1728 his wife intimated to him, that there were some letters wrote by *Christopher Ploy*, a person sent for as an evidence at the trial, to her father before the trial, which she thought might be of service to him. But then this was in *February* 1738, which was both after the trial and decree. But it is objected on the defendant's side, that this is no proof, because this affidavit is made by the plaintiff ; and strictly speaking it is not : yet notwithstanding this, it has always been considered as satisfactory, as far as it concerns the plaintiff's own knowledge ; and it is impossible for a man to give more certain evidence when a thing came to his knowledge : and to shew that it is sufficient, an affidavit of the same nature was allowed in *Hannekra v. Jackson*, where, though LORD HARCOURT dismissed the bill on this exception, yet the House of Lords reversed his decree, and held the evidence sufficient. Besides, in the present case this affidavit of the plaintiff's is strengthened by the defendant's answer ; for they do not swear,

(a) *Eq. Cases Abr.* 67.

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nor indeed say so much as they believe, that this came to the plaintiff's knowledge before. It is true, this is not an admission; but it is a passing over what has been alledged; and all they say is, that these letters came lately to their knowledge. But these affidavits were then filed; and whenever a matter is pointed out on one side, and not contradicted on the other, it corroborates what is sworn; and it often happens on motions, that the facts are imperfectly stated; but if the other side have an opportunity to clear them up, and do, it strengthens what is sworn. But suppose it can be taken in this case, that they came to the plaintiff's knowledge between the trial and decree, yet it was after publication passed; and then the question is as to the true construction of *Lord Bacon's Rules*: and though to be sure this does not expressly come under his description as being new matter, yet it is new proof of a matter which could not be made use of at the time of the decree, it being discovered after publication; and LORD NOTTINGHAM says, that it must be such as could not be taken advantage of at the time of the decree; and so is 1. *Chan. Prec.* Now if the proof comes after publication, as the plaintiff is forced to proceed to a hearing, he cannot have any advantage of his new proof at the time of the decree. But it is farther objected, that though this was discovered after the trial at law, yet it might have been made use of on the motion for a new trial. But that is not now to be considered on a bill of review; neither is the Court or the plaintiff bound by that, for new trials are entirely discretionary in the Court.

THE NEXT OBJECTION is, that supposing it does sufficiently appear to have come to light since the making the first decree, yet if it appears to have come to knowledge before the supplemental bill, that is enough to repel the reading of these letters. But as to the second decree, that was merely consequential while the first stood in force, for the first bill was brought making the heir at law defendant; and the Court decreed a performance of trusts for the charities mentioned in the will. The heir at law afterwards brought an ejectment; but he was not admitted to proceed, for the same reason as is laid down in *Vernon v. Acherley* (a), that a man should not be suffered to overturn a decree by a proceeding at law. Therefore I say, while the first decree stood in force, the second decree must be made; and though the second decree for a perpetual injunction was made to hinder the plaintiff from proceeding at law, yet it doth not bar him from proceeding in this court, nor can it be pleaded to a bill brought here: and indeed the reason of granting a perpetual injunction to stay proceedings at law is in order to confine them to this court for relief, and therefore the bringing this bill is not inconsistent with that decree. But supposing, for argument sake, that the decree for a perpetual injunction would have stood in his way had these letters come to his knowledge before that was obtained, yet as he has sworn that his wife, in

(a) 2. Bar. Chan. 212. 426.

February 1738; intimated, and indeed only intimated, to him, that she believed there might be some letters which would be of service to him; and it is further sworn, that it was *Michaelmas* 1739, and not before, that she told him that she remembered the purport. We are now to consider, whether these letters did not come to the plaintiff's knowledge even after the second decree; for it is not to be imagined that every bare hint of matters in the custody of the adverse party is to be called coming to a man's knowledge. His wife only told him there were some letters before the second decree; but it was sworn that she told him what the substance of them was since that second decree. Now this evidence must be considered *secundum subjectam materiam*; and therefore it is natural to imagine, that the plaintiff might think it dangerous to proceed on this sort of evidence until he was sure what might be the effect of it; otherwise he might possibly oblige the defendant to produce evidence which might be against him; and therefore as the words of the rule are, "that the evidence must come to light or knowledge after the decree was made, in order to have advantage of it by review," I do not think it can be properly said to have come to the plaintiff's knowledge before. But then it has been alledged for the defendant, that this affidavit is somewhat suspicious, and that it might possibly have come to his knowledge before; and so indeed are all those cases where a man swears when a thing came to his knowledge. So is the case of *Hannekra v. Jacobson*, and indeed stronger than the present; for there a bill was brought on foundation of new evidence which was contained in his own custody in a box in his garret; and the plaintiff annexed an affidavit, that the letters which the box contained were sent over after the death of the intestate, and that they had lain in his garret, and he had not read them before the former decree; and LORD HARCOURT allowed a demurrer to this, and so dismissed the bill; but THE HOUSE OF LORDS reversed this decree, and ordered the Court to proceed on the bill of review; though to be sure this evidence was liable to many suspicions that it might have come to the party's knowledge before. And that case is much more suspicious than this; for there the letters were in the plaintiff's own custody, but here they were in the custody of the adverse party.

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ANOTHER OBJECTION to the reading of these letters is, that it tends to the admission of examination of fresh matters after publication, which the Court ought to avoid. But here is the less danger in the present case, because it is in relation to letters in the defendant's custody; and as this evidence is in writing, there is no danger of perjury. Besides, there is another very material circumstance which would induce me to admit of this proof, which is, that on reading over this bill in the nature of a bill of review, I observe, that the plaintiff has charged the defendants with fraud; and being so, I think it is a strong ingredient in the present case, because fraud is a sufficient foundation for a bill of review; and there are several cases to that purpose, as *Richmond v. Taylor*; and fraud will overturn a judgment at law as well as a decree in this court;

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for if an executor confess a judgment, and plead it to an action brought by a creditor, the plaintiff may reply *per fraudem et covinam*, which, if found, is sufficient to overturn the judgment; and so it would the decree here; though I do not say that I presume any fraud in the present case.

These are my reasons why I am of opinion, that the letters ought to be admitted to be read; though I must say, I had a great deal of balancing in my mind, because I would be very cautious how I extend these rules as to admitting new evidence further than absolute necessity requires. This determination, however, cannot introduce any general rule as to these matters, because it entirely depends on its own particular circumstance. I AM THEREFORE OF OPINION, that these letters ought to be read.

Case 131. Sergison and Mary his Wife *against* Sealey and Others.

In Chancery, Michaelmas Term, 16. Geo. 2.

If a father, previous to his being found a lunatic, make a purchase of an estate with the consent and approbation of his only son, the purchase is good, and the money laid out therein shall not be considered as personal estate.

S. C. 2. Atk.
412.

MR. PITT being an elderly gentleman, and seized with a palsy, was so far affected as to lose the use of his feet and limbs, and his speech was so far injured that he was scarce able to pronounce anything more than "aye" and "no," and at last his memory was so far impaired that he could only answer to very short questions; for if the proposition was of any length he could not retain it. His son was entitled to both his real and personal estate; and in 1724 a commodious purchase offering, he made proposals to his father to buy it, who upon the description of it agreed to it, and rode out along with his son and steward to view it. Upon which a conveyance was made to the old gentleman; and, the purchase-money being a thousand pounds, he drew an order upon his banker for the payment of it. In 1726 a commission of lunacy issued against him, and the jurors by the inquisition found, that old *Mr. Pitt* was a lunatic without lucid intervals at that time, and had been so for eight years before, which was some years precedent to the purchase. The son died in the life-time of *Mr. Pitt* his father.

And it now became a question between *Mr. Pitt*'s heir at law and his personal representatives, Whether this purchase should not be considered as personal estate, it being made by a lunatic?

IT WAS ARGUED in favour of the personal representatives, that a lunatic not having discretion to manage his property, this Court will not suffer him to alter the nature of it, so as to change real into personal, or personal into real estate (a); and though he be capable of a grant of lands to him by law, yet this Court, notwithstanding, will consider such purchase as personal estate in indulgence to his personal representatives. That an infant is under the

(a) See *Ex parte* Ludlow, 2. Atk. *parte* Bromfield, 3. Brown. Ch. Rep. 407. *Ex parte* Annandale, Amb. 80. 510.
Ex parte Grimstone, Amb. 706. *Ex*

same incapacity ; nor will this Court suffer the trustee of an infant to do an act to alter the course of succession or descent, as to lay out money in land, not if the infant have ever so much, or the purchase be ever so commodious. Much more this Court will not suffer the money of a lunatic to be invested in land, to transfer the succession from the executor to the heir ; for if the Court were to permit this, it would put it in the power of trustees to dispose of infants or lunatics estates as they pleased, as in relation to personal and real representatives.

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HARDWICKE, *Lord Chancellor*. The general question in this case is, Whether here are sufficient grounds in a court of equity to set aside a purchase and consider land as personal estate ? for taking *Mr. Pitt* to be a lunatic, or *non compos mentis*, which perhaps is a better term, for want of will, he was capable of taking a grant of the real estate (a) which has descended to the plaintiff ; and as it is vested in point of law as real estate, the question is, Whether the purchase may be set aside in equity, so as to be esteemed a personalty ? This arises upon two points : The first, Whether there is sufficient evidence to induce the Court to believe, that at the time of making the purchase this gentleman was a lunatic ? The second, Whether this Court is to consider it as personal estate if he is one ?

In relation to the evidence of lunacy, I AM OF OPINION, that there is not sufficient evidence that he was at that time absolutely a lunatic ; the only thing that has been read to it is the inquisition which found him to be a lunatic without lucid intervals at the time of issuing the commission in 1726, and for eight years before. The jury have gone too far in finding him a lunatic for so long back ; they might perhaps with reason have found him incapable of managing his affairs with that exactness as he ought, and he not a lunatic ; which I believe to be the case ; for this arose from an indisposition by the palsy ; and there have been often persons struck with an apoplexy which has afterwards turned to a confirmed palsy. At first it might but just affect the motion of his muscles, as in this case it took away the use of his hands and feet, and left him very little power of his tongue ; but in course of time the patient, by the weight and advance of his distemper, may become quite *non compos*, which I believe to be the case of *Mr. Pitt* ; for it is possible he might be a lunatic at the time of the inquisition, and capable before. The eight years over-reach the time of the purchase ; but an inquisition is not conclusive evidence, for it may be denied and traversed. Nay, it is not conclusive to the point of time in which it is found, much less is it to a retrospect. There have been many instances wherein juries have found a man a lunatic for many years before the inquisition, and notwithstanding that evidence has been given to another jury upon trials to controvert such former inquisition, and the jury have found him not to be a lunatic. What confirms

(a) See Co. Lit. 2. b. Perkins, f. 51.

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me that this retrospect of the inquisition is false is, that in 1724, which was but two years before the issuing of the commission, this gentleman lived at the head of his family, had the management of his estate in his own hands with the assistance of his son, and his steward to see it, and drew an order upon his banker to pay the purchase-money; and it is not reasonable to think, that the son, who is entitled both to his real and personal estate, would have made all this parade if his father had been a lunatic. As to *Mr. Pitt's* being capable of answering "Aye" and "No," there has been a case of very great consequence not long ago determined, that a man who could do so might pass his estate by will. Therefore, as the evidence stands, I think him capable of making such a purchase; and I shall not send it to a trial at law.

But I do not rely solely on the opinion that *Mr. Pitt* was not *non compos*; for supposing him to have been *non compos* at the time, yet there would not be sufficient ground to change this real estate into personal, because there is great difference between this case at the time of the transaction and the case of a lunatic; for this gentleman lived at the head of his family with his son to assist him, who was entitled to the possessions of his father both real and personal. The act itself is a very reasonable one, and no objection against it by the persons who claim to have it decreed as personal estate. He was a gentleman of a very large personalty, for the jury found him to be worth thirty-seven thousand pounds. He had been a *Spanish* merchant in town, and afterwards retired into *Somersetshire*.

The case of infants is, as has been argued, that their personal estate shall not be converted into real estate by their guardians (a); nor will this Court suffer it if application be made to it for that purpose, unless with this reserve, that it shall be considered as personal estate if he die before twenty-one. But that is different from the present; for in that the estate left by the parent was never in the power or management of the infant himself, or of the guardian, and therefore to be sure neither of them ought to take upon them such change; but here *Mr. Pitt* has had a power over the estate for many years; and though afterwards he becomes weak by a palsy, yet the family continues still to go on in the same manner, and the old gentleman assisted in his affairs by his son and steward, and a reasonable act is done; and if the Court was to overhaul these things, so as to consider a real estate as personal, it would be very mischievous. Suppose *Mr. Pitt* had made leases for life, would the Court have set them aside, though a jury afterwards thinks fit to find him a lunatic for many years back, and that improperly too? Compare the present case with that of lunatics in the care of this Court: there, whereforever an account is to be taken of a lunatic's estate, the order is, to have those persons

(a) See *Tullit v. Tullit*, Amb. 370. *Inwood v. Twyne*, Amb. 417.

to attend who are at that time entitled to his real or personal estate. If the account be taken, and the parties who were then entitled die, the persons who come next to be entitled, though they were not present at the account, shall be concluded by it. Nay, further, if a reasonable purchase offered itself for a lunatic, and would serve to meliorate his fortune, if there has been no objection by the parties entitled, but they have consented to have the money invested in land, this purchase will be good, and bind all future persons who shall be intitled to the personal estate of the lunatic, though they were not themselves consenting to such purchase; which is the present case; for the son, who was then entitled both to realty and personalty, was assenting, and the present claimants of the personal are bound as much in this case as the former before mentioned. Therefore there is no ground to vary this purchase.

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In Chancery, Michaelmas Term, 16. Geo. 2.

MR. BURR having four children, by will devised all his real and personal estate to trustees, and willed them to convert it into money, in trust that it should be divided equally among his children, any of whom dying under twenty-one, such share was to go to the survivors. *Mr. Vobe* intermarried with the testator's daughter *Jenny Burr*, who was then an infant of about eighteen. The marriage was without the consent of the trustees. The trustees had invested her fortune in their own names in *Bank* and *South-Sea* stock to the amount of five hundred pounds. The trustees also lent *Mr. Vobe* sixty pounds to pay off some debt; *Mr. Vobe*, for security, gave bond; and afterwards assigned over to *Mr. Moulston* all the share of the fortune his wife was entitled to under the will of her father, and this while the wife was still an infant.

In what cases a court of equity will oblige the assignees of a husband to make provision for his wife.

And to a demand of a creditor upon these stocks, *Mrs. Vobe* insists upon the equity of this Court to give her a provision.

MR. CHUTE, for *Mr. Moulston* the creditor, argued, that this Court in general takes care of *femes-covert*, but that such care is only discretionary in the Court, and like a party coming here for the specific performance of articles, which the Court, upon circumstances, may either grant or refuse; that it is not like the case of a bill for redemption within time, for that is necessarily decreed, and *ex debito justitiæ*; that if the husband came into this court himself for his wife's fortune, the Court will not decree it him without a provision for the wife out of it, or some other fund of the husband's; but where a faith is grounded upon a wife's fortune,

B b 3

and

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and a person trusts the husband upon the credit of it, it is otherwise, and she shall not be entitled to a provision against him.

In the case for terms of years, the husband may by law dispose of them without the joining of the wife ; and this Court will never interpose to prevent the operation of law, which in many cases has stripped the wife of a provision. This Court has even gone farther, and has made the like direction of a trust-term to the sole and separate use of the wife granted by a former husband, which a second husband may dispose of without joining the trustees ; as in the case of *Sir Edward Turner* (a), in the House of Peers. And the first case to that purpose is *Tudor v. Samyne* (b), where it is decreed, that the husband might sell such trust of a term ; and though it was objected, that the husband in that case had made no provision or settlement for the wife, and if he himself was plaintiff the Court would not decree the trustees to assign to him without making some settlement on the wife, and the plaintiff, who is a purchaser of the trust-term and devises under the husband, ought to be in no better a condition, *sed non allocatur* ; which seems to point out a distinction as to giving a provision to the wife as between the husband and her, and not where there is a third person as a creditor or purchaser ; that in the present case the law operates with *Mr. Moulston* ; and though the wife has an equity to have a provision, yet *Mr. Moulston* is a pecuniary creditor, and has an equity to have his debt paid, which ought to turn the balance, especially as he has the common law on his side as well as equity.

1. Peer. Wms.
249, 250, &c.
Miles v. Williams.

Yates v. Dandy, 16th July,
1741, in chancery.

That as the husband, by the very act of marriage, becomes liable, in both his liberty and property, to the debts of his wife, contracted by her *dum sola*, it would be extremely hard if he should not have the same privilege of paying his own debts by her money ; for the law makes the husband an absolute present of all the wife's personality, even of *choses in action*, at least a right of recovery and of turning them into possession, whereby they become his own absolutely. A husband has a right to assign over a mortgage which the wife has in fee, and yet by law he cannot transfer the fee, though he can in equity : this point your Lordship determined in the case of *Yates v. Dandy*, 16 July 1741, where the wife of *Dandy*, in representation to her brother, was entitled to a mortgage in fee ; and the husband by note acknowledging, that he had borrowed so much money of the plaintiff, promised to transfer the mortgage : after that he did so, and upon *Mr. Dandy's* death, it became a question between the assignee and the widow, Whether she should be entitled against him ? He insisted, it was quite unprovided for ; and yet it was decreed, that the husband had power to transfer the mortgage, though by law he could not the fee : and in this case it was remarkable, that the mortgage was more than sufficient to pay the debt ; and though the wife had not relief for provision against the assignee, yet she had out of the surplus against the representative. That *Mr. Moulston* had supplied *Mr. Vobe* the husband with

(a) 1. Vern. 7.

(b) 2. Vern. 270.

wines, by which he has maintained the whole family, *Jenny Vobe* the wife included; and therefore it would be unequitable that she should have the whole fortune.

MR. ATTORNEY-GENERAL *to the contrary*. The question is, Whether or no the defendant *Moulston* has a right to come into a court of equity to have three hundred and fifty pounds *Bank* stock and one hundred pounds *South-Sea* stock which belonged to *Jenny Vobe*, wife of *Mr. Vobe*? There are two things proper to be mentioned as the ground upon which we go.

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FIRST, The general rule of equity, that wheresoever the husband comes into a court of equity in order to have his wife's fortune, if he has made no provision the Court will take care that he shall do it, either collaterally or out of his wife's estate; and it is the most common case, if there is such demand by the husband, that an enquiry is ordered to see what provision the husband has made. There is a difference, it has been said, as to this Court decreeing a provision for a wife, between trust-money, where the husband or creditors can only come into this court, and money in the hands of an executor or administrator which belongs to the wife, where the husband can come into the spiritual court for it; that in this latter case the Court will not intermeddle to enjoin the spiritual court. But that is a mistake; for as this Court has a joint jurisdiction with that as to wills of personal estate, it will take up the claim of the wife, and will not let the husband have a legacy there until there is a provision made for her; and injunctions have been granted to that court for that reason. Which THE CHANCELLOR agreed had been so determined.

SECONDLY, This right that a wife has to a provision out of her own fortune runs along with her fortune into all hands, and is clothed with this equity when in the hands of a creditor to her husband. And this is but natural justice; for it is not reasonable it should be in the power of the husband to defeat the wife of this incidental right, for she has not barely a *jus ad rem*, but *in the thing* itself; and surely the reason of the Court's interpoling at all is, the fear it has lest the wife should want a maintenance. That as the wife has this right of provision in her fortune, a creditor or assignee from the husband shall take the fortune equally subject to that charge, and shall be in no better condition than the husband. And as in the case of *Benson v. Turton* (a), where there was a clandestine agreement by *Mr. Turton* with the young lady's father to return one thousand pounds, part of her fortune, in seven years time, without interest, and a bond was given for that purpose, the whole fortune was put down in the writings, and this bond was given unknown to *Mr. Turton's* mother, who had made a settlement upon the young couple upon consideration of the entire fortune. *Mr. Turton* brought his bill to be relieved against this bond, which

(a) 1. Peer. Wms. 496.

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the young lady's father had assigned in trust for his creditors; and it was decreed, that the creditors could be in no better condition than the young lady's father, and that relief would run upon it into whatsoever hands it came.

He then argued, that if *Mr. Moulston* was to have the benefit of this assignment, it would chalk a way to the husband always to deprive the wife of her provision; and if she denied to assign it voluntarily, he might get a person to buy it at an under-price, which would be a valuable consideration. There is no injustice in this case to *Mr. Moulston*, for he cannot take this without notice of the wife's right, and he must purchase at his peril.

Watson v. Masker, at the
Rolls, 1732.

He then cited the case of *Watson v. Masker*, at the Rolls, March 19, 1732, which was a bill by assignees under a commission of bankruptcy against *John Masker*, against the administrator of *Samuel Wise*, for his personal estate. *Masker*, the bankrupt's wife, being *Wise's* sister, and intitled to it, insisted, that as she was unprovided for, the assignees stood in the place of her husband, and ought to give her a provision; and THE MASTER OF THE ROLLS was of opinion, that she was entitled to it against the assignees; and considering her husband was a bankrupt, and incapable of maintaining her, he decreed her the interest of such personal estate for life, and then he ordered it to be for the use of the assignees: he then asked if there were children; and as they had been married fifteen years, and had had no children, and there was no probability of any, he refused providing for them; though he said such provisions were usual.

He then cited the case of *Jacobson v. Williams (a)* and *Richmond v. Taylor (b)*.

MR. CHUTE, in opposition to these two cases, cited the case of *Bosvil v. Brander (c)*.

THE CHANCELLOR said, he would look into the Books, and fixed *Wednesday* the third of *November* 1742 for giving his opinion.

HARDWICKE, Lord Chancellor. These are cross-causes, and both take their rise originally in the will of *Joseph Burr*, who at the time of making it had five children; and by it he gives several legacies, and afterwards disposes of the residue of his personal estate, which he gives to his executors in trust, and directs, that it shall be divided among his five children, viz. his four sons and his daughter *Jenny Vobe*, share and share alike; and if any of them should die before twenty-one, and without issue, then he directs and appoints such share to be divided among the survivors equally. He then goes on and takes up the consideration of his real estate, which were two houses that were originally the estate of his second wife; but by marriage-articles covenanted to be conveyed to him in fee;

(a) 1. Peer. Wms. 382.

(c) 1. Peer. Wms. 458.

(b) 1. Peer. Wms. 735.

but which never were conveyed. However, he devises the trust of them, and directs, that she should convey to his executors, and that they should sell and turn them into money, to be distributed in like manner as the personal estate.

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CASS.

These are the directions of *Mr. Burr*, who died and left five children, his daughter *Jenny*, whose share is at present in question, being under age at the time of *Mr. Burr's* death; but whether any of the other were or are still so does not appear. One of the brothers died after his father, under twenty-one, and by his death his share survived and went over to the other four children, of which *Jenny* was one. After this, upon the twentieth of *August* 1739, the defendant *Vobe* married *Jenny Burr*, the daughter, without making her any provision or settlement, and then contracted debts with several persons, but especially a large one with *Mr. Moulston*, the plaintiff in the cross-cause, for wines in the way of his trade; and on the twenty-third of *March* 1739, he entered into a bond to *Mr. Moulston* to pay him his debts; and on the twelfth of *April* 1740, about three weeks after giving the bond, made an assignment to him in this manner. He assigns to him all the share of *Joseph Burr* the father and *Harry Burr* the son's personal estate, which he was entitled unto in right of his wife, for and towards the payment of the principal and interest of the debt. Upon the thirtieth of *May* 1741, he made another assignment to *Masters* and *Carter*, in trust for all his creditors, of all his right, title, and interest, in and to the fourth part and share of *Burr's* estate, upon trust for payment of the debts of all his creditors, subject, however, to the prior assignment. At the time of this transaction, *Jenny* was an infant, and attained her age only in 1741, about seven months after the last assignment. The surplus of the father's estate, as to what appears, remained undivided, I mean as to any solemn account between the parties; and there seems to be no account to make a division of the estate which shall be conclusive and binding.

Two bills are brought: The first in the name of the executors and trustees in the will of the father, bringing all proper parties before the Court, and prays, that upon their paying *Jenny Vobe's* portion to such persons as the Court shall direct, they may be indemnified and released from their trust.

The cross-bill is brought by *Mr. Moulston* the assignee, who prays, that the executors may assign to him the share of *Jenny Vobe's* portion for the payment of his debt, and then submits to the Court, whether the surplus shall go to the husband and wife, or to the creditors under the subsequent assignment.

In the several answers, these two assignments are insisted upon: As to the husband the equity is plain, that *Moulston* upon the first, and all the creditors upon the second assignment, as against him, shall have the fortune, subject to the payment of their respective debts; but the question arises in regard to the defendant the wife, for whom it is urged,

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FIRST, That by the consent and equity of this Court, if a husband having married a woman an infant without making provision for her, or if she be not an infant and she do not consent, and he come into this court for her fortune, it will not be decreed him till he has made a provision for her.

SECONDLY, That this right of provision is an equity which is attached or annexed to the thing or estate itself, therefore the assignee takes it subject to the same equity; and that he shall not have the aid of this Court to have the assignment applied to the payment of his debts, though for valuable consideration, without first making a provision for the wife in the same manner as the husband would have been obliged to do.

AS TO THE FIRST QUESTION, which relates to the husband, the equity is extremely plain; and it is an equity grounded upon natural justice, and that parental care which this Court exercises for the benefit of young infants who are orphans, deprived of the advice of their parents, and often drawn into improvident matches; for which reason this Court seats itself *in loco parentis*, and settles a provision for the wife out of her fortune, upon a presumption, that her parent would not bestow her fortune upon a husband without a provision for his child. Therefore if the husband be forced to sue for his wife's fortune in this court, or in any other court with which this has a concurrent jurisdiction in that demand, the husband shall make a provision for his wife before he shall attain to her fortune. And upon this it is, where a portion has been left by way of legacy, as it is here, and the husband has passed by this court and gone into the spiritual court, which he may do, this Court has enjoined the husband from proceeding there, and compelled him to come into this court, or restrained him there until he had made reasonable provision. But such injunctions go only to such courts with which this has a concurrent consueance. And this has been apprehended to have been a newer and more recent exercise of jurisdiction of this court than it really is; for if you look into *Tothil's Records, or, Transactions in Chancery*, 1695, he mentions the case of *Tanfield v. Davenport* (a), where a person suing in the spiritual court for a portion due to his wife, this Court enjoined him until a provision was made for her. This was so long ago as the fourteenth year of *Charles the First*, in LORD COVENTRY's time; which shews this to be a more antient exercise of the jurisdiction of this court in this respect than is imagined.

Though this be so, yet if the husband can come at a particular chattel debt or duty of the wife without the aid of this court, or any other having concurrent jurisdiction with this, I do not know where it has interposed, even against the husband himself. Therefore if there has been a debt, or part of her fortune, whether equitable or legal, if the debtor would pay it, I do not know where the Court would hinder him, or upon an original bill by the wife would

(a) Tothil, 179.

decree him to make a provision for her. So where there has been a bond-debt due to a woman *dum sola*, and an after-taken husband has sued the debtor at law, I do not know a case where the Court has granted an injunction to stay proceedings until he had made her a provision, for there this court has no jurisdiction; and he could not come into it for debt, it being only suable for in law. But I will not say, that if the bond-debt was the only fortune of the wife, what this Court would do; but there is no case where it has gone so far.

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As to THE NEXT POINT, that this is an equity which is attached or annexed to the thing or estate itself, and therefore the assignee takes it subject to the same equity, and that he shall not have the aid of this Court to have the assignment applied to the payment of his debts, though for valuable consideration, without first making a provision for the wife in the same manner as the husband would have been obliged to do.

Upon this second question the doubt has arisen. In the cases upon this subject there appears some variety of determination; and it is not easy to reconcile the differences. This is clear, that if the husband make any voluntary assignment or conveyance of the portion of the wife, she will have the same equity against such voluntary assignee as against the husband himself: and this is the case of *Burnet v. Kynaston* (a), which was, where a wife was entitled to a mortgage in fee, and the husband assigned his interest in the mortgage to trustees to call in the money and invest it in land to be settled to the use of the husband and wife and their issue, remainder to the right heirs of the husband; the husband and wife died without issue, and a representative of the husband claimed the benefit of the mortgage by virtue of the assignment; but the Court dismissed the bill, because the husband had not an absolute power over the mortgage, but being in the nature of a *chose in action* he had only a right to reduce it into possession; and not having so done in his life-time, his assignee stood but in the place of the husband, and could not have a greater right or power than the husband himself had, which was only to reduce it into possession in his life-time; and not having so done, it must survive to the wife, notwithstanding the assignment, and must go to her administrator. There would be the like equity against the executor or administrator of the husband as against a voluntary assignee; and also the same equity against any person who stands in the place of the husband; and that is the case of assignees under a commission of bankruptcy, that where they take benefit of a wife's fortune under a general assignment of the commissioners, they shall be bound by this equity or right of provision in the wife; and if they come into this court, they must allow a provision for the wife, because they take only just the same estate and interest as the husband did, and the act of parliament throws it upon them without consideration. This has been so determined in

(a) 2. Vern. 401.

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CASE.

the case of *Jacobson v. Williams* (a). That case deserves to be cited at large, for there is something particular in it; and is thus: *Walter Walinger*, by his will, left his niece, *Elizabeth Taylor*, an infant, one thousand pounds, payable after the death of the testator's wife, and at his said niece's age of twenty years, if she should so long live; the niece married *J. S.* without the knowledge or consent of her father; *J. S.* being at that time much in debt by judgment and otherwise, and having gained the young gentleman's consent by bribing her maid-servant. The niece was about eighteen. Soon after the marriage, *J. S.* became a bankrupt, and the commissioners assigned over all the estate and effects of the bankrupt to the plaintiffs in trust for the creditors, who brought the bill for this legacy, the testator's widow being dead, and the niece being about twenty years old, and consequently the legacy due; and the bankrupt had two children by his wife then living. This cause coming on before **BARON PRICE** in the absence of **THE CHANCELLOR**, **THE BARON**, in regard to the creditors, decreed the legacy and interest to be paid to the plaintiffs. But upon appeal from that decree to **THE CHANCELLOR**, his Lordship declared, that so far as the plaintiffs, the assignees in the commission, claimed under the bankrupt, they ought not to be in a better case than the bankrupt himself; and since, if he had brought a bill for that legacy, the Court would not have allowed it him without obliging him at the same time to make some provision for the wife and children, so, for the same reason, when these claiming under the bankrupt (and who must be exactly in the same case as he himself would have been in) come for equity, they ought to do equity, which would be to provide for the wife and children of the bankrupt, from whom they derived their claim; but with regard to the interest of the money, as the bankrupt was commonly allowed to receive that, so the assignees ought to receive the same during the bankrupt's life: also if the bankrupt's wife should die without issue, then the bankrupt would have been allowed to have received the whole money, and therefore in such case the assignees should be allowed to receive it also. **MR. VERNON**, in this cause, cited the case of *Taylor v. Wheeler* (b) to shew, that assignees under a commission of bankruptcy are not to be considered as purchasers; and to be sure it was a very good case for that purpose, and was thus: *A.* mortgaged a copyhold for a considerable sum, but the conveyance was defective for want of a surrender being presented in time. After which *A.* became a bankrupt; and **THE COURT** helped the mortgagee of the copyhold against the assignees under the commission, which he urged to be an argument that the creditors or assignees of the commissioners are not to be considered as purchasers. Upon another objection in this cause, viz. that the assignment was made before any right to the legacy vested in the wife, for by possibility it might never vest, because she might die before twenty, the Court said, it was clear that the commis-

(a) 1. Peer. Wms. 382.

(b) 2. Vern. 564.

sioners could not assign this possibility of right which the bankrupt had in the portion; and consequently, the assignees being plaintiffs in the bill, and intitling themselves under this assignment, which is void with respect to such possibility, therefore the bill must be dismissed. Here is a particular train in the report of this case; and it looks as if LORD COWPER rested his opinion upon the assignment of the possibility's being void; but if he founded his decree upon that only, it was a wrong one, and is not law, for commissioners of bankruptcy may assign a possibility, and it has been so determined often; for the words of the act of parliament are, "all that the bankrupt can de-
"part with," and a possibility may be released or assigned in law or equity. And though LORD COWPER mentions the point of the possibility at last, yet there is nothing in the report which shews that he was of a different opinion as to the wife's right of provision against the assignees.

INZON
gains
MOULSTON,
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OR,
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CASE.

2. Vern. 563.
Thomas v.
Freeman.

Another case cited at the Bar is that of *Watson v. Masker*, before SIR JOSEPH JEKYLL, late *Master of the Rolls*, in 1732; and that case is as it was cited, and is the same resolution as in *Jacobson v. Williams*, that assignees standing in the place of the bankrupt shall not have the wife's fortune without making her a provision at the same time out of it. But though these cases are so in relation to the husband himself, and in relation to voluntary assignees or assignees under a commission of bankruptcy, yet where the husband has, for a valuable consideration, assigned a particular specific chattel or debt, whether legal or equitable, which the husband can reduce into possession without coming into this court, or those having concurrent jurisdiction with this as to the thing demanded, there the resolutions have been contrary, that such assignees shall not be compelled to make provision for the wife; and this is the case of *Tudor v. Samyne (a)*, and was thus: *A.* being possessed of a remainder of a term for thirty-nine years, conveys it to trustees for the separate use and benefit of the defendant his wife, who marries *B.* a second husband, who first mortgages the term, and then assigns it to *C.* who brings his bill against the wife and her trustees, to compel them to assign over the legal estate to the plaintiff; and decreed accordingly; for as the husband may dispose of a term for years, where the legal estate is in the wife, so he may of the trust of a term without either the wife or the trustees joining; and *Sir Edward Turner's Case* was cited, that a term assigned by the first husband for the separate use of the wife may be sold or disposed of by the second husband. It was objected, that the husband in this case had made no settlement or provision for the wife; and if he was plaintiff, the Court would not decree the trustees to assign without his making some settlement on the wife; and the plaintiff, who derives under the husband, ought not to be in any better condition: *Sed non allocatur*. There was a dispute at the Bar, whether the

Ante, 376. S. C.
cited at large.

(a) 2. Vern. 207.

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JENNY VOBE'S
CASE.

non allocatur was to be applied to the assignees making a provision; or to the husband's; and I AM OF OPINION, that it is to be applied to the assignees not being obliged to make a provision, for the husband in such case would: though it was said, the husband would not; because this jurisdiction of making provision for wives has arisen since that case; but that is a mistake, for that doctrine was very well understood at that time; and that appears from *Totbil* as above in the reign of *Charles the First*, and that in its full extent; for the case he mentions was of an injunction even to the spiritual court. So *Walters v. Saunders* (a) is thus: A. made a settlement, whereby he created a term for years, in trust to raise four hundred pounds a-piece for his two daughters; one of them married B and he and his wife brought a bill, and had a decree to have the four hundred pounds raised and paid; but before it was raised, B. assigned the benefit of the decree to one J. S. in trust for payment of his debts, and made him executor, and died, leaving his wife and one child unprovided: the creditors brought a bill to have the benefit of the said assignment; and though it was insisted upon in behalf of the wife, that there was a difference between a term in trust to raise a sum of money for a woman and a trust of the term itself for a woman, yet THE MASTER OF THE ROLLS held, that this being a term for years, and not a sum of money, and therefore not to be distinguished from *Sir Edward Turner's Case*, he must decree it, though against his conscience, that there may be an uniformity of judgments. So is the case of *Bosvil v. Brander* (b): A *feme sole* was a mortgagee in fee for eight hundred pounds, and married a tradesman, who becoming a bankrupt, a commission of bankruptcy was taken out against him; and the commissioners assigned over all his estate, both real and personal: afterwards the husband died; and the writings relating to this mortgage being in the assignee's hands, the widow of the bankrupt brought a bill against them for these writings, and to have the benefit of the mortgage: the cause came on to be heard, and for its difficulty was ordered to be spoke to again; when His Honour delivered his opinion solemnly for the wife; but afterwards being dissatisfied with that opinion, he ordered the decree to be stayed, and to be attended again by Counsel. Whereupon His Honour gave his opinion, that if there had been any articles before the marriage purporting that this mortgage-money should continue in the wife as her provision, or should be assigned in trust for her, they would be a specific lien upon the mortgage, and have preserved it from the bankruptcy. Also it might have been a matter of different consideration if the assignees had been plaintiffs in equity, and desired the aid thereof to strip an unfortunate widow of all she had in the world, towards the doing of which equity would hardly have lent any assistance, because the assignees claiming under the bankrupt husband could be in no better plight than the husband would have been; and if the husband had in equity sued for the money, or else prayed that the

(a) *Eq. Cases Abr.* 58.

(b) 1. Peer. Wms. 458.

mortgagor might pay the money to the husband without his making some provision for his wife, or at least the wife, by an application to the Court, might have prevented the payment of the money to the husband, unless some provision were made for her. But in the present case, the widow is plaintiff against the assignees, so that she, and not the creditors, seeks the aid of equity. And there being in the mortgage-deed a covenant to pay the mortgage-money to the wife, this debt or *chose in action* was well assigned by the commissioners to the assignees, and vested in them; like the case of *Miles v. Williams* (a), where a bond made to a woman *dum sola* was adjudged to be liable to a future husband's bankruptcy, and assignable by the commissioners. Wherefore if the right to the debt was vested in the assignees, as plainly it was, though the legal estate of the inheritance of the lands in marriage continued in the wife, yet this was not material, it being no more than a trust for the assignees: like the common case; where there is a mortgage in fee, and the mortgagor dies, here the mortgage-money belonging to the executors, though the heir takes the legal estate by descent, yet he is but a trustee for the executor; for the trust of the mortgage must follow the property of the debt, else the mortgagor would be in a very hard case, liable to be sued by the assignees of the commissioners upon the covenant, and also in ejectment by the wife of the mortgagee; whereas the latter suit would be enjoined by equity. So in the last case cited, which is that of *Bates v. Dandy* (b), before me on the sixteenth of July 1742, which will appear to be a case much of the same kind with the last before SIR JOSEPH JEKYLL; for the two mortgages were two specific things, part of the property of the wife from her brother *John Dyer*, of whose personal estate there had been an account taken, the shares divided (for there were several persons entitled), and the estates parted; and there was a declaration signed by the parties, that the total amount of the surplus should be carried to the account of such partition, and that the mortgage in fee should remain to *William Dandy* and *Mary* his wife; and the deeds were accordingly delivered over to him; he borrows money of *Bates* the plaintiff, and gives him a note to assign the mortgage in fee to him, and deposited the deeds in his hands as a security till then, just as the assignees had the custody of the mortgage in the said case of *Bosvil v. Brander* (c), before SIR JOSEPH JEKYLL; and I WAS OF OPINION, that the creditor of the husband had a lien upon the mortgage, and that I could not take it from him until the money was paid; and though I decreed this part against the wife, yet as there was a surplus after the payment of *Bates*, I decreed that against the representatives of the husband in favour of the wife. In these four cases last cited, the particular contracts of the husband, and the considerations upon which the same assignments have been made, have got the better of the wife's equity of provision; and they seem to go upon the same ground in two of the cases, viz. *Tudor*

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CASE.

(a) 1. Peer. Wms. 249.

(b) 2. Atk. 207.

(c) 1. Peer. Wms. 458. 2. Eq. Abr. 113.

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against
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et contra;
OR,
JENNY VOBES'S
CASE.

v. Samyne and Walker v. Saunders, as in *Sir Edward Turner's Case*, whether rightly applied or not I will not say. And the ground in *Sir Edward Turner's* was, that as the husband might assign a term of his wife's, so he might assign the trust of a term, for equity follows the law, and there ought to be the same rules of property in equity as at law. The court of chancery at first shewed great dissatisfaction at such a determination in THE HOUSE OF LORDS; inasmuch that, in *Pitt v. Hunt* (a), the LORD CHANCELLOR NOTTINGHAM, whose decree was reversed in the case of *Sir Edward Turner*, said, THE LORDS had altered the law without an act of parliament; but he said, he must be concluded by THE LORDS' judgment, for that there must not be one sort of equity above stairs in THE HOUSE OF LORDS and another below stairs in chancery. But where the husband has, for valuable consideration, assigned a debt, duty, chattel, or *chose in action* of the wife's, there this Court has grounded the validity of it upon the authority the law gives the husband to receive, recover, or get in, such things of his wife's; and where they have been assigned specifically for valuable consideration by the husband, it will be binding upon the wife.

As to the last assignment made to the defendants *Masters and Carter*, I AM OF OPINION, that part of the case does not differ from that of assignees under a commission of bankruptcy; for *Vobe* assigns all his goods and chattels generally, and all his right or share of his wife's fortune, and not the thing itself; and it is only against him, and not against the wife.

As to the first assignment to *Moulston*, which is in consideration of a particular debt of six hundred and four pounds due from *Vobe* to *Mr. Moulston*, that is different from the general assignment, and differs also from all the cases I have cited; and there are no cases to come up to it. For first, the present is the case of a mixed fund arising from both real and personal estate; for the father, *Joseph Burr*, by will has devised this real estate to trustees and their heirs, with directions to sell and turn it into money, and that to be considered as personal estate; but if the debts and legacies of the father had been paid, and all the children had come to age, they, no doubt, might have come against the trustees to have it continued as real estate, if it had not been sold, and they would have had that equity; and in relation to such real estate, the wife being an infant, any disposition of it by him would have been void.

SECONDLY, *Mrs. Vobe* was an infant during all this transaction, even at the last assignment, and therefore the peculiar object of the care of this Court. Besides, the assignment was not of a term for years, or of the trust of a term, or of any specific particular debt, or chattel, or *chose in action* due to the wife, but it is of the whole fortune; for *Vobe* assigns to *Mr. Moulston* all the share of *Joseph Burr* the father and *Henry Burr* the son's personal estate which he

(a) 1. Vern. 18.

was entitled unto in right of his wife, for and towards the payment of the principal and interest of *Mr. Moulston's* debt ; and all this of an assignment of such an estate or interest which the husband had not, nor could reduce into possession without coming into this court, for there had been no partition to bind all the children. The trustees indeed had, out of their care, paid the children part of their fortunes, and had invested four hundred and fifty pounds in stocks for *Jenny Vobe* ; but this was of their own head ; and there could be no account taken to bind the parties, nor could the trustees joining with the husband himself do it ; for the wife was an infant, and if she died before twenty-one there was right of survivorship in her brothers to have her share ; and if any more of the brothers had died before twenty-one, she would have come in as a partner in their fortunes ; so that the trustees, as yet, could not tell what *Jenny Vobe's* proportion was. Therefore the defendant *Moulston*, who is plaintiff in the cross-cause, must have known, at the time of the assignment, that he took an interest of the wife's which all the parties joining together could not make secure to him without an interposition of a court of equity, and therefore must take it subject to the equity of making a provision out of it for the wife.

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And in this case I lay great stress upon the assignment's being a general one of the wife's whole fortune ; and if such assignment should prevail against the wife, it would defeat all the care and caution of this Court relative to infants ; for a man would need only to run away with an infant, and if he could not come at her fortune (if the trustees stood out) without the aid of this Court, to assign over her whole fortune for valuable consideration ; and that he might do, though neither he nor the lender might come to the certainty of this, and might only know in the gross that it was worth the money advanced ; and perhaps such husband might be in debt before his marriage, might be a tradesman in fear of either arrests or of a commission of bankruptcy against him ; and he would not fail in such circumstances, nay it would be the constant case for him to assign his wife's fortune in this general manner for his creditors, which would leave the widow and children quite destitute, and defeat the care of this Court, if such assignment were to stand.

And this weighs with me, that I ought not to suffer such assignment to prevail. To this it may be objected, that people will not venture their money upon such assignments, where there may be some hazards, and where they have not had some opportunity of looking into the title and deeds to be ascertained of the value, and therefore there is no danger of such general assignments as the present one is. But I fear, if I was once to allow and legitimate these proceedings, there would be people enough who would do it ; for though they could not tell the absolute particulars of the fortune, yet they might know it to be sufficient to pay them.

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CASE.

THEREFORE I AM OF OPINION, in the present case, that I ought not to make a decree in the cross-cause in favour of the creditor, *Mr. Moulston*, or the creditor under the subsequent assignment.

As to the decree, what LORD COWPER says in the case of *Jacobson v. Williams* is material. He says, "as to the interest, as the husband was allowed to receive it, the assignees should receive it during his life; and if the wife died without issue, the assignees should have the whole." If this is the rule, *Mr. Moulston* will be entitled to receive all the interest for the life of *Mr. Vobé* the husband; the consequence of which will be, that as *Mr. Vobé* is a failing man, his wife and children will be starved, and *Mr. Moulston* have no great benefit, for he will receive yearly but barely the interest of his debt. Therefore I think the best way will be, if *Mr. Moulston* will come into terms, to give the wife and children a proportion of the money, and he to have the rest himself. This way, all will have a benefit; the wife will have an immediate provision, and the creditor will have a gross residue.

MR. ATTORNEY-GENERAL then said, that in the case of *Richmond v. Taylor* (a), the whole money was ordered to be put out at interest for the benefit of the wife.

But HARDWICKE, Lord Chancellor, said, he had read that case, and that he would not have done so; and supposing the wife and children had come against the husband himself, he would have only made a provision for her and the children after the death of her husband.

MR. ATTORNEY-GENERAL replied, that in the case of bankrupts or failing husbands it was otherwise; for there the provision was to be made immediately, because of the inability of the husband to maintain them; and that was the case here.

But HIS LORDSHIP said, the first proposal would be lost; and accordingly ordered it to stand over till the first day of causes after the first Seal after Term, when *Moulston* and the wife agreed to divide the stocks equally between them; and the wife's share was agreed to be placed out at interest in the accountant-general's name, and she to have the interest to her separate use during her life; and after her death, the principal to be divided equally among her children; and if none, the money to be paid as she should appoint.

(a) 1. Peer. Wms. 734. 2. Eq. Abr. 516.

Steward and his Wife *against* The East-India Company. Case 133.

SIR EDWARD COWEN being settled at *Bombay*, in the *East-Indies*, and having raised a large fortune to the value of sixty-eight thousand pounds, in order to return it to *England* obtained a bill from the governor and council of *Bombay* upon the *East-India Company* here for fifty thousand pounds. Thirty-five thousand pounds, part of the fifty thousand pounds, they paid him without scruple; but as fifteen thousand pounds, the remaining part of it, was not paid in cash, but consisted of two bills drawn by *Sir Edward* upon *Mr. Lowther*, his agent at *Surat*, for sixty thousand rupees each, they refused to pay that until an account came from *Surat* that the two bills had received proper honour by *Mr. Lowther*; which arriving, the *Company* paid it with interest from the time it was due. *Sir Edward*, after this, wanted to remit eighteen thousand pounds more, and paid the money to the governor and council at *Bombay*, and had bills for that sum on the *East-India Company*, who refused payment, because they said the fifteen thousand pounds was not paid by *Mr. Lowther*.

A bill was then brought by the representatives of *Sir Edward Cowen* against the *East-India Company* for this sum of eighteen thousand pounds.

And upon motion it was prayed, that the plaintiff might be at liberty to inspect the books and papers at *Surat* and *Bombay* in relation to the transaction of two bills drawn on *Lowther*, and that the factor might produce them upon oath.

HARDWICKE, *Lord Chancellor*. This case is different from that of a stockholder of the *Company*, who is a member of it, and has a right to inspect such books wherein his stock is contained as much as a copyholder has to examine the rolls of the manor which relate to his own title. The modern way has been to shorten answers more than formerly. The antient method was, that where the answer was deficient, the plaintiff continued excepting till a full answer was put in; or if the bill was insufficient to produce a satisfactory answer, the plaintiff amended it; but at this day, where the defendant does not set forth deeds and writings fully, the Court gives the plaintiff a liberty, upon motion, of inspecting them, and of having them delivered to him by the defendant for that purpose upon oath, and also to take copies of them.

The motion here is, that as the *East-India Company* have put in an answer that the entries and writings specified in their answer are all which relate to the transaction of the fifteen thousand pounds, as they are informed by their factors at *Bombay* and *Surat*, that that is not satisfaction enough to the plaintiff, as Companies do not put in their answers upon oath, nor do the factors swear that these are all the entries. The plaintiffs, therefore, move to have these books and entries inspected, and the factors to be examined touching them

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them upon oath. But this is a motion I cannot comply with, for many reasons. This transaction is first in the years 1735 and 1736, and the consultation of the books of the Company in their factories abroad, or duplicates thereof as transmitted into *England* every year, or at least as often as ships come; therefore the motion should have been to inspect those entries here. SECONDLY, Such an order of inspection would introduce great inconveniencies, for the consultation-books in the factories abroad contain matters of government and public regulation as well as those things which relate to private trade; and if the plaintiff was to have a general licence to inspect, he would see entries of other natures than his own, which would be very mischievous to the Company; and as you have not named particularly in your notice what particular entries or papers are to be examined, I can make no certain order about it. Besides, THIRDLY, though you have not the answer of the Company upon oath, yet it has been usual in many cases, as the case of the York Buildings Company, the case of the Charitable Corporation, the case of the South-Sea Company, &c. to make several of the members of such societies defendants to the bill in their natural or personal capacity, in order to have the satisfaction of their answer upon oath; and if you have not particularly enough named your writings which you want, you may amend your bill, and make the factors defendants; or if the Company has not answered sufficiently, you may except until they do.

Cafe 134.

Montgomery *against* The Attorney-General.

In Chancery, Michaelmas Term, 16. Geo. 2.

The court of chancery will not grant a new trial after two trials at bar, although the verdicts were contrary to each other, unless such new trial appears necessary to the justice of the case, from *new evidence* which could not be had on the former trials.

S. C. 2. Atk.
378.

IN THIS CAUSE there had been one TRIAL AT BAR and verdict in the common pleas in favour of the will, and a subsequent TRIAL AT BAR and verdict before the court of king's bench against the will, and in favour of the heir at law.

MR. ATTORNEY-GENERAL now moved for a new trial, because this being the case of an inheritance, it is not to be bound by one trial, nor where there are two trials and verdict against verdict; that though the last verdict is against an heir at law, yet he is an heir against whom the testator had expressed a great disregard in his life-time; that the will was solemnly signed in the presence of three witnesses, and two codicils proved to be wrote by *Elias Turner*, the testator's own hand; that there was nothing at all absurd or inconsistent in the will, which first provides for the widow, and then bestows the fortune in favour and for the support of decayed merchants in *London*; that in the case of *Leighton v. Sir Edward Leighton (a)* there were four trials in ejectment.

HARDWICKE, Lord Chancellor. The Judges of the court of king's bench, before whom the last trial was, have certified to me, that they are not only not dissatisfied, but quite satisfied, with the

(a) 1. Peer. Wms. 671.

verdict

verdict against which a new trial is now prayed; and as they are so, I have reason to be so too, and cannot take it that anything improper passed at the trial. If there is any ground for a new trial, it must arise from collateral circumstances, and not from such as were submitted in evidence before the last jury. It is insisted for the new trial, that here is verdict against verdict, for there has been formerly a verdict at *Guildhall*, before *WILLES*, Lord Chief Justice of the common pleas, and there the jury found the testator *compos mentis*, and THE CHIEF JUSTICE certified also that he was satisfied with the verdict.

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against
THE
ATTORNEY
GENERAL.

But all this is no reason why a third trial should be granted; for A TRIAL AT BAR is a most solemn act (*a*), and ought to have more weight than a verdict at *nisi prius*. But it is not singly the difference of the two trials, but the weight of the new evidence appearing in the last trial, which was granted upon fresh evidence, *viz.* letters from one *Ploy* which were not produced at the former trial; and he could not be cross-examined as to them upon the former trial; and I thought this fresh evidence so very material, that I granted the heir at law an opportunity of having them submitted to the scrutiny of a jury. This evidence, it seems, has had the same weight with the special jury and the court of king's bench as with me; which gives a further sanctity to this verdict besides the solemnity of the trial.

There is another circumstance which is an ingredient in the case, that this last verdict at bar has been found by a jury of gentlemen of the county of *Essex*, where the latter part of the life of *Elias Turner*, the testator, was spent; and they were more proper, from their private knowledge, to try his sanity than a jury of *London*, he having left the city for some years.

There is another reason to impeach the verdict in the common pleas at *Guildhall*, that this was a devise of a charity for the use of the city of *London*, and it was natural for men of *London* to wish well to this charity, of which they themselves might be partakers, or their friends, and this without any plain partiality or corruption of mind; and though I do not do this to impeach their consciences, yet it lessens the credit of their verdict, and must, without their thinking it, make them a little partial.

As to what has been said, that there have been a great many proceedings in favour of the charity in this court, yet they were all grounded upon, and consequential to, the first verdict; and as that is now laid out of the case, all those must necessarily fall along with it. As to the case of *Leighton v. Leighton*, that was a bill for a perpetual injunction, and upon a legal title; there had been two trials at *nisi prius* and two at bar; but that was not like the present case, for that was upon a legal title, and at a time when the doctrine

(a) Reg. v. Bewdley, 1. Peer. Wms. 207. Baker v. Hunt, 3. Atk. 542.

MONTGOMERY of granting perpetual injunctions was not very well settled in this court.

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ATTORNEY
GENERAL.

The motion was denied, and his Lordship went upon the equity reserved.

Case 135.

Sergison against Sealy.

A court of equity will dispense with the form of the instrument by which an appointment in pursuance of a power is made.

S. C. 2. Atk.
414. nisi.

WILLIAM PITT, son of *Samuel Pitt*, intermarried with *Jane Palmer*, and *Samuel Pitt* settled an estate, in consideration of that marriage, upon *William Pitt* for life, remainder to trustees to preserve, &c. remainder to the first and every other son in tail, remainder to the right heirs of *Samuel Pitt*, the father; subject, however, to a term of five hundred years, the trust of which was, that *Jane* the wife, after the death of her husband, should have power to dispose of four thousand pounds by any deed or writing signed in the presence of three witnesses. *William* the husband died, leaving issue one only son, *Samuel Pitt*, an infant, who became intitled to an estate-tail, with remainder to himself in fee. The widow, *Mrs. Pitt*, afterwards intermarried with *Mr. Speake*, and by marriage-articles, attested by two witnesses only, covenanted and granted, that it should be lawful for *Mr. Speake* to levy and raise the sum of two thousand pounds, part of the four, by any ways or means that she herself was entitled to raise the same by virtue of the settlement, and to dispose of the same as he should think fit, so as he secured the repayment of the same sum out of his own estate within one year after. But as to the other two thousand pounds, remainder of the four, it was covenanted by the same articles, that she shall have that to her separate use. *Mr. Samuel Pitt*, the infant, entered, and had a guardian afterwards appointed over him and his estate, and died at the age of about nineteen, whereby his real estate came to *Mary*, the wife of *Mr. Sergison*, the plaintiff, and his personal, which was very considerable, to *A. B.* There had been no interest paid either to *Mr. Speake* or *Mrs. Speake* for their respective sums of two thousand pounds; and now it became a question, between the real and personal representatives of the infant, by whom the interest was to be paid.

HARDWICKE, *Lord Chancellor*. The questions are two: the first, Whether these articles amount to an appointment of the sum of four thousand pounds, or any part of it, so as to be an execution of this power?

SECONDLY, If they are, by whom, and from what time, interest is to be paid?

AS TO THE FIRST, the two moieties of this sum will fall under different considerations, viz. the two thousand pounds intended for the use of *Mr. Speake* the husband, and the two thousand pounds for the sole and separate use of the wife.

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As to THE FIRST SUM for the benefit of the husband, not as his own absolute property, it seems to me by these articles, that he should have a benefit arising from thence during the coverture. From the settlement read it is plain, that it was not intended that four thousand pounds should bear interest until the appointment was made of it, for it is not to be paid in all events, for it is a power to raise it by appointment only; and as there is no provision for interest, none could arise but by the appointment. These articles are to be considered as an appointment in relation to the sum of two thousand pounds for the husband, although they are executed in the presence of two witnesses only, whereas the power requires three; and that is an objection not to be allowed in this court; for if a person has a power to appoint a sum of money, and executes it for valuable consideration, failing however in circumstance even in a legal interest to raise a term, yet this Court will even there supply the defect, and much more so when the execution is only in regard to a trust, as here, for the legal estate is vested in trustees, and if it was executed in form it would only operate upon the trust of the sum of money, the legal estate being in other hands. Mrs. Pitt recites in the articles, that she is entitled to the sum of four thousand pounds charged, as they call it, upon Mr. Pitt's estate; and by the articles it is agreed, "that it shall be lawful for Mr. Speake to levy the said sum of two thousand pounds by any ways or means that the said Jane Pitt is entitled to raise the same, and to dispose of it as he thinks fit, so as he secures the repayment of the same money within one year after her death." This is said to be only a delegation of her power to Mr. Speake, which would be void. But I am of opinion, that is not a bare delegation; for though it is not formally done, yet it amounts to a grant of the two thousand pounds to Mr. Speake; for the words "covenant and grant to him" to raise it within one year after the marriage, to use as he thinks "fit," amount to a grant to him, so that he secures the repayment of it within one year after her death, but that is to be without interest, for he is to receive the profits of his own estate; and it is only changing the charge, and the money is to be raised only upon her death; therefore it could not be liable to interest before. And I am of opinion he was to have an usufructuary interest in it, otherwise he would have no benefit of it by the articles at all. If interest was to be paid for the two thousand pounds out of Mr. Pitt's estate from the time of the appointment, and that benefit was intended Mr. Speake by the articles, then he might have demanded this two thousand pounds to have been raised out of her estate within one year after the marriage. As this is a covenant for valuable consideration for a thing to be done, this Court ought to take it as done; and in that respect it falls within the reason of *Lady Coventry's Case*; where there was a covenant in consideration of marriage and a portion, for the execution of a power Lord Coventry had to make a jointure, it was considered as an actual execution of that power. Therefore, upon the whole construction of these articles, they must be considered as a grant of that sum

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upon his giving security for it out of his estate ; and if it had been a grant, it would have amounted to an execution of the power ; and notwithstanding it is done by covenant, and as to circumstances there is a defect as to the number of witnesses, yet I am of opinion it is a good execution.

A court of equity will not supply a deficiency in the circumstances required to attend the execution of a power, if it is not executed on a valuable consideration.

As to the remaining two thousand pounds, it falls under a different consideration, for it is not a covenant for the execution of the power, for in it the husband is to take nothing, nor the issue ; *Mrs. Jane Pitt* is to have it for her separate use as before ; and then it comes to the same case as if *Jane* had executed a writing making this appointment, and executing this power voluntarily, without consideration, before two witnesses only, when the power requires three, which is a void execution ; and this Court never supplies these defects, unless for a valuable consideration.

From what time
interest shall be
allowed.

THE NEXT QUESTION relates to interest ; and the execution of the power being void as to one two thousand pounds, the question as to interest reaches not that ; but as to the interest of the other two thousand pounds, it is insisted upon by *Mr. Speake*, that the interest is to be computed from the time of the articles ; and if so, it is insisted upon by the personal representatives of *Mr. Samuel Pitt*, the infant, that it is not to be paid out of the personal assets, but is to run on as a charge upon the estate during the life of the infant, and after his death to be paid out of the profits, or raised out of the estate ; and on the other hand it has been insisted upon by *Mr. Sergison*, who is intitled in right of *Mary* his wife to the remainder in fee after the death of *Samuel Pitt* the infant, that during the infant's life the interest ought to have been kept down by the profits ; and this upon two grounds : First, That *Samuel Pitt* the infant was only tenant in tail, with remainder in fee to himself, which remainder in fee was originally limited to his father *William Pitt* ; and *Samuel* continuing an infant till his death, and never suffering a common recovery, it never came a remainder in possession ; and when it fell to *Mrs. Sergison*, she took it from the father, and not as heir to the son ; and there is that nicety in point of law between a fee-simple in possession and a fee-simple expectant on an estate-tail, of the former there may be a *possessio fratris*, but of the latter not. But I do not know any case where the Court has considered the owner of the estate-tail, with remainder to himself in fee, to be a debtor to his heir at law to keep down interest. I do not know what the Court would do if the remainder in fee was in a stranger ; but where there is tenant in tail, remainder in fee, he thereby having the estate one way or other wholly in himself, this Court will not decree it ; and though, in point of law, *Mrs. Sergison* is not compelled to take the estate as heir to *Mr. Pitt* the infant, yet she must make her cousinage through him ; and in a *formedon*, she must shew herself as heir at law to the infant, though when she comes to lay her right she may claim it from the father.

AND

AND I AM OF OPINION, that the guardian ought to have kept down the interest out of the profits of the estate ; that in the case of an infant, the Court will take care of his rights, and of the rights of his representative ; and if a bill had been brought against the guardian of the infant's person and of his estate, if the estate brought in profits would order those to keep down the interest out of the profits, and not from the personal estate ; and this in favour of persons who are intitled in representation to the personal estate, and the guardian would be ordered to apply them in that manner ; that if the profits are unaccounted for, as far as they regard his maintenance, they must be applied to the keeping down the interest ; but if the profits would not maintain him, this Court would not starve the infant if he wanted a maintenance, unless there was a mediate demand upon him from the person who had the charge ; but here there is great reason that the profits shall be applied to keep the interest down, for there is both a very great real and personal estate.

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Therefore I must decree, that the interest must be kept down by the profits of the estate upon which it is charged.

Elwys against Sir John Thompson.

Case 136.

In Chancery, Michaelmas Term, 16. Geo. 2.

GEORGE HITCHCOCK, upon the marriage of his daughter with *Mr. Elwys*, gave him a bond and judgment for a thousand pounds as part of his daughter's fortune. These were in trust for *Mr. Elwys*, but the bond was not payable until after the death of *George Hitchcock* and *Mary* his wife. *George Hitchcock* afterwards, by his will, recited, that "WHEREAS he had settled three hundred pounds a-year on his wife for her jointure, and that his estate would not raise much above half that sum yearly," and gave "all his real estate to his wife as a satisfaction, subject, however, to the payment of his debts ; PROVIDED that if his nephew *John Hitchcock* would agree to pay to his wife the yearly sum of one hundred and fifty pounds and two hundred and fifty pounds in money, then he should have such estate to him and his heirs, subject, however, to debts." The nephew *John* agreed with the widow for ninety pounds a-year, and paid debts of the testator, as appeared by a schedule, to the amount of fifteen hundred pounds. *John* was also heir at law to *George*, and mortgaged not only the lands of *George* which came to him, but also his own estate, to *Sir John Thompson* for one thousand pounds, who at the time had no notice of the judgment. Afterwards a commission of bankruptcy was taken out against *John Hitchcock*, and his goods and estate were assigned over, by the commissioners, to *Sir John Thompson*, the mortgagee, in trust for himself and the other creditors. This bill was brought by an equitable assignee of the judgment, in order to have a satisfaction of the judgment, and to discover what incumbrances there were upon the

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the estate affected by the judgment ; and if any, to be let into a redemption upon payment of principal, interest, and costs.

Sir John Thompson, in bar of this redemption, has insisted upon two things :

FIRST, That if the judgment is then upon the land, yet the person intitled to it shall not redeem it, because there are lands comprised in his mortgage which are not affected by the judgment, which only charges the land of *George Hitchcock*, and not of *John Hitchcock* his heir.

SECONDLY, That as no execution or recompence was had upon this judgment before this bankruptcy, such judgment shall be considered only as a personal duty, and the proprietor of it be obliged to come under the commission, along with the rest of the creditors, for his proportionable share.

THIRDLY, That the assignees under the commission are purchasers upon the land affected by the judgment as well as the judgment-creditor himself, for they stand in the place of *John Hitchcock*, who is a purchaser upon the estate of *George Hitchcock*, as far as he has discharged any of *George's* debts, which he has done to the amount of a thousand and five hundred pounds ; and that in right of him, the assignees have the same equity as the judgment-creditor himself ; and therefore this Court will not interpose, but leave the judgment-creditor to his remedy at law.

As to the first, MR. NOEL argued, that the judgment-creditor might redeem *Sir John Thompson*, the mortgagee, though there were lands comprised in the mortgage which were not affected by the judgment ; and cited the case of *Titley v. Davies* (a), in the present Chancellor's time, three years ago : *Mr. Titley*, who was a subsequent mortgagee, had not so many lands contained in his mortgage as there were in a prior one to *Mr. Shepherd* : however, he brought his bill to redeem him ; and the question was, Whether he should redeem in proportion, and so the subsequent mortgagee to have benefit as far as his lands were contained in the prior mortgage ? And there your Lordship decreed, that he should redeem the whole upon payment of principal, interest, and costs.

As to the second objection it was argued, that this judgment is not a personal duty against the heir of the ancestor who gave it ; and that therefore such judgment-creditor, if he cannot affect the land of the ancestor specifically in the hands of the heir, he cannot affect the person of the heir himself, nor come in as a creditor under a commission of bankruptcy ; for in *Dyer*, 81. a. if a father give a bond for one hundred pounds, and bind himself and his heirs, and die in debt against the heir, by the opinion of all the Justices, the plaintiff cannot have a *capias ad satisfaciendum* against the heir,

(a) 2 Eq. Abr. 604.

because

because it is not his proper debt, nor an *elegit* of other lands than what descended from the ancestor in fee-simple, and no goods or chattels, so the *elegit* shall be special in this case ; that the judgment-creditor comes against the heir as terre-tenant, and not as a creditor personally to him. 3. *Coke's Rep.* 15. a. *Sir William Harbert's Case*, and *Sir William Jones*, 88.

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As to the third objection it was answered, by THE LORD CHANCELLOR himself, that there are two reasons for the plaintiff to come into a court of equity : THE FIRST, That he has not the legal interest in this judgment, but only an equitable assignment, and therefore he cannot take out an *elegit*. THE OTHER, that though the trustees having the legal interest are co-plaintiffs with him, yet notwithstanding that he cannot succeed at law, because the deeds and writings are in the possession of the defendants ; that it is agreed at the Bar, that a *scire facias* was brought at law against *John Hitchcock* the heir, who pleaded, that his ancestor was not seised ; and as the plaintiff could not prove seisin, for want of the writings, he was obliged, and very properly, to fly to this court.

THE LORD CHANCELLOR added, that if the bankruptcy was out of the case, it would be very plain, that this judgment-creditor would affect the lands antecedent to this mortgage ; but as it is a mortgage without notice, equity will not suffer it to be disturbed, but will oblige the judgment-creditor to redeem it ; and the only question arises upon the intervening bankruptcy, Whether, as the bankruptcy has fallen out before any satisfaction or remedy had upon the judgment, it is such a debt of the heir as the proprietor of it is to come in as a personal creditor for a share under the commission, or is to affect the land ?

MR. ATTORNEY-GENERAL and BROWNE then argued for the defendants.

HARDWICKE, *Lord Chancellor*. The defendants are not warranted in insisting upon it, that the plaintiff, the judgment-creditor of an ancestor, is to come in as a creditor under a commission of bankruptcy against the heir. If, indeed, this had been a bond-debt, in which the ancestor had bound his heir, who had become a bankrupt, there might be some colour to charge the heir with the bond-debt as his own, upon the statute of Fraudulent Devises ; for if the heir in such case alien the land before the process against him, it makes the bond-debt of his ancestor become his own proper debt, and gives an action to the creditor against him for it, with an express proviso, that such creditor shall not come against a purchaser *bona fide* ; and if it had been the case here, that if the assignment under the commission of the ancestor's estate devised to *John* had been *bona fide*, so as the judgment-creditor might have come against the heir as for a debt due properly from him, much might have been said ; but the judgment is a lien upon the land itself, and would have been so even in the hands of a purchaser for a valuable consideration ; *a fortiori* therefore it must be a
lien

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lien in the hands of assignees under a commission of bankruptcy, who stand only in the same light as the bankrupt himself; and this case is not within the statute of Fraudulent Devises; and there is no remedy for the judgment-creditor to come under this commission; therefore that is out of the case.

And as to what has been insisted on, that *Sir John Thompson* is not only a purchaser under his mortgage, which to be sure he is, but that he is a purchaser likewise as assignee under the commission, as standing in the place of *John Hitchcock*, who is to be considered as a purchaser, and if so without notice, and consequently the plaintiff is not intitled, as against him, to have any remedy but after a satisfaction of everything he has purchased, which is to the amount of fifteen hundred pounds, being debts of the ancestor paid by the bankrupt; but there is no ground to say that *John Hitchcock* is a purchaser for valuable consideration, for he comes only under the will of *George Hitchcock* his uncle, and stands in the same place that *Mrs. Hitchcock* the devisee would have been in. And suppose she had been defendant in this suit, she could not have said that she was a purchaser of this estate for a valuable consideration, for he comes only under the will of *George Hitchcock* his uncle, and stands in the same place that *Mrs. Hitchcock* the devisee would have been in. And suppose she had been defendant in this suit, she could not have said that she was a purchaser of this estate for a valuable consideration. How the three hundred pounds a-year arose it does not appear; she was a devisee, and there was a real estate liable to a judgment, and made subject by the testator to the payment of his debts, and after for payment of an annuity or any other charge brought upon it by the testator's will; the devisee enters and pays debts of a small and main nature, and omits paying judgment debts, which are a lien on the lands; he is not a purchaser against the judgment-creditor as to payment of those subordinate debts, but he acts at his peril, and the land will be still, in the first place, liable to the judgment, which is a matter of record that he ought to take notice of; and this is not coming in for valuable consideration, but it is taking the estate as a trustee under the will.

THEREFORE I MUST DECREE, that the plaintiff, the judgment-creditor, ought, in the first place, to redeem *Sir John Thompson's* mortgage; and though there are other lands comprised in the mortgage which the judgment does not affect, yet as *Sir John Thompson* insists upon his whole mortgage-money being paid him, the redemption cannot be restrained and proportioned to the judgment-lands, but shall be whole and entire, extending to all the lands; but when the estate is come into the hands of the plaintiff, the judgment-creditor, the equity will be of a different kind, for he cannot charge his judgment upon the estate of the heir, but he will be intitled to have all the estate of the ancestor liable to be applied to his judgment; and if there be any surplus, that must go towards satisfaction of the mortgage-debt, the residue of which

which debt must be thrown upon the estate of the heir; and if there is any surplus after payment of the judgment and mortgage, that must be applied to *Sir John Thompson* for the benefit of the creditors of the bankrupt; but the best way will be to have the estate sold. Which he decreed; ordered the money arising from such sale, to the value of the lands affected by the judgment, to be applied to discharge such judgment; and directed the Master to enquire the value of such lands; and if they fell short, he was to have no satisfaction out of any other of the lands; and as to the rest, decreed as above.

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Patterson against Tash.

Case 137.

In Chancery, Michaelmas Term, 16. Geo. 2.

MR. PATTERSON, the plaintiff, being an *Irish* merchant who dealt in linens, employed *Messrs. Ewys and Wilcox* as his factors in *London* to sell his goods for him, under a commission of two and a half *per cent.* and shipped linens for them in the ship *Dublin* to the amount of nine hundred pounds. An invoice was sent over by the post to them, and they indorsed it over to *Kisara Tingie*, for the benefit of *Mr. Tash*, to secure a debt from the factors to him of about eight hundred pounds, *Mr. Tash* being nowise privy to this transaction, for *Mr. Tingie* did not deliver the invoice to him till a month after it was indorsed. This indorsement was made in the morning, and the ensuing night the factors absconded, and a commission of bankruptcy was taken out against them; and the plaintiff brought his bill to be relieved against this indorsement.

In what case
the court of
chancery will
direct the point
in dispute to be
tried at law.

S. C. 2. Stra.
1178.

HARDWICKE, *Lord Chancellor*. This is a matter triable at law in an action of *trover*; for if a man put his goods in the hands of a factor, he gives him power to dispose of them; and if they are sold, the action for the money may be brought either in the name of *the factor* or *the principal*; and as factors have a power to sell, they may do so to secure a debt due from themselves to another, if there is no fraud or collusion in the person to whom the goods are sold, and he is a creditor for a valuable consideration really and *bona fide*; which seems to be the case of *Mr. Tash*. And a factor may make such assignment or bill of sale of his principal goods to secure the debt of creditors who are not even privy to such securities being given. Nay further, they may make such assignments although they are in failing circumstances; and there have been several cases to this purpose; and though there have been several attempts to set aside such assignments by factors who are failing, in this court, yet they have never been allowed. And in the case of *Jacob v. Shepherd (a)*, before LORD KING, which

(a) 2. Eq. Abr. 122. cited. 2. Peer. Demattos, 1. Burr. Rep. 478 — See also Wms. 431. ; and stated at length by Bourne v. Deddon, 1. Atk. 154. Lord Mansfield in the case of Worley v.

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was very much debated, and wherein he reversed the decree at the Rolls, he sent the point to be determined at law; and in such action of *trover* there will be tried, not only the question of factors in general, whether such assignments will alter the property of their principal's goods, but also the question, whether the factors were bankrupts at the time of such assignment? If they were, it will impeach the assignment that way. The consequence of all this will be, if the assignment passes no property, you will have your goods returned in specie; if it do pass a property, the defendant will only be entitled to his debt out of them, and the remainder will belong to the plaintiff; but this is proper to give directions about after the trial has been at law (*a*).

(*a*) This cause was tried at *Guildhall* in Hilary Term 16. Geo. 2. before LEE, Chief Justice, who held, that though a factor has power to sell, and thereby bind his principal, yet he cannot bind or affect the property of the goods by pledging them as a security for his own debt, though there is the formality of a bill of

parcels and receipt, S. C. 2. Stra. 1178; and therefore if a factor pledge the goods of his principal, the principal may recover the value of them in an action of *trover* against the pawnee, on tendering to the factor what is due to him, without any tender to the pawnee, Daubigny v. Duval, 5. Term Rep. 604.

Case 138.

La Noy against The Duchefs of Athol.

In Chancery, Michaelmas Term, 16. Geo. 2. 1742.

S. C. 2. Atk.
441.

MR. LA NOY, upon his marriage with *Jane Frederick*, now *Duchefs of Athol*, and mother of the plaintiff, by indentures dated the twenty-eighth and twenty-ninth of *January* 1718 settled his estates in *Hammer-smith* and *Fulham* to the use of himself for life; and after his decease, to the intent that *Jane* might have a rent-charge of five hundred pounds a-year in lieu of dower, remainder to his heirs male; remainder to *Mr. La Noy* in fee. In this settlement *Mr. La Noy* covenanted, that if *Jane* should survive him, his heirs, executors, or administrators, would pay her the said five hundred pounds a-year. After the marriage, *Mr. La Noy* surrendered some copyhold estates to the use of his will; and in 1719 bequeathed the residue and remainder of all and singular his estate, both real and personal, wholly and solely, after paying his just debts, unto the defendant *Jane*; and appointed her sole executrix; but in case he should leave any issue male by the said *Jane*, then he gave to such issue his estate at *Hammer-smith*, freehold, copyhold, and leasehold, he paying to his mother five hundred pounds a-year; but if he left only a daughter, then his wife should pay her when she married, if it was with her mother's consent, six thousand pounds. By indenture dated the twenty-first of *October* 1723, reciting, that *Mr. La Noy*, in right of his wife, was entitled, by her father's death, to a large sum of money, he, in consideration thereof, covenanted to levy a fine of the estates comprised in the indentures of the twenty-eighth and twenty-ninth of *January* 1718 to the use of himself for life; and after his decease, to

secure

secure the said *Jane* the said rent-charge of five hundred pounds for life, in bar of dower; remainder to trustees for a term; remainder to the first and other sons in tail male; remainder to the heirs of the body of *Mr. La Noy*; remainder to himself in fee. The trusts of the term were to raise six thousand pounds for daughters portions, if no issue male, and maintenance at the rate of eighty pounds a-year. *Mr. La Noy* died, leaving the plaintiff, his daughter and only child. *Jane* married the *Duke of Athol*.

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Upon hearing this cause, LORD HARDWICKE declared, that the settlement in 1723 was a revocation of the will as to the freehold and leasehold estates comprised in that settlement, and as to the legacy of six thousand pounds bequeathed to the plaintiff; but as to all freehold and copyhold lands not comprised in the said settlement, the same belonged to *Jane* and her heirs by virtue of the said will; and his Lordship decreed, that the defendant *Jane* should come to an account for the rents and profits of the premises comprised in the settlement of 1723 since the testator's death: and the said defendant was, in the first place, out of the rents and profits, to deduct and retain to her own use five hundred pounds a-year; and in the next place, she was to deduct two hundred and ninety-three pounds for fines and charges of renewing the leasehold estate; and also to retain eighty pounds a-year for the maintenance of the plaintiff: and the said defendant *Jane* was to account annually for the rents and profits, and to make the like deductions.

The plaintiff petitioned for a rehearing, shewing, that accounts had been taken by the Master since the decree, and he had made his report, whereby it was stated, that the rents and profits had been yearly deficient to answer the said five hundred pounds a-year, the said eighty pounds a-year, and the fines; so that there was a balance due to the defendant of three thousand nine hundred and thirty-seven pounds, which they were to retain out of the next rents and profits; and in consequence of this, if the defendant *Jane* was to live a few years longer, and such arrears were considered as a charge upon the freehold and leasehold estates, the plaintiff would be deprived of her portion of six thousand pounds, and also of her inheritance.

HARDWICKE, Lord Chancellor. This cause comes to be reheard after a great length of time; but that is no objection here, because at the original hearing *Miss La Noy* was an infant, about three years of age, and has but lately attained her age of twenty-one, and comes in time to complain if she was aggrieved by that decree. It has been mentioned, that it appears by the proceedings in the cause that there was a surprise upon the Court, all the facts not being sufficiently stated in the pleadings. But that objection ought to be laid out of the case, for I have read over the decree in which the pleadings are recited, and it there appears, that the material points in the cause, and all that the parties could then foresee, are put in issue for the judgment of the Court; the two settlements are truly stated, except as to the covenant for payment of the rent-charge of five hundred pounds a-year; and I cannot impute

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impute that omission to any design, because it is probable there might be no occasion or reason to make use of that covenant; and therefore it was not stated in the bill. The will of *Mr. La Noy* is also set forth; and the great point as to the stocks and annuities which stood in the joint names of the husband and wife at the time of the death of the husband was not only stated in the bill, but also insisted upon by *the Duchess's* answer; with this further, that the pleadings do not represent the case as if the estate would in all events answer the annuity of five hundred pounds a-year, and all other charges upon it, because *Mrs. La Noy* expressly states deficiency in her answer, therefore no design to prejudice the interests of the infant. But if anything has been omitted, though without design, or if the Court has erred in judgment, the plaintiff, *Miss La Noy*, is intitled to have the decree rectified, and to be relieved.

The objections against the decree are: FIRST, That there is a direction given in it for the payment of five hundred pounds a-year for *Mrs. La Noy's* jointure, as also of eighty pounds for *Miss La Noy's* maintenance, out of *Mr. La Noy's* real estate, whereas the real estate falls much short of doing this; for though it is recited in the settlement to be a thousand pounds a-year, it is, in reality, no more than four hundred pounds; therefore *Miss La Noy*, the plaintiff, is entitled, as heir to her father, to have her inheritance exonerated, and the five hundred pounds a-year and eighty pounds a-year maintenance considered as debts, and to be turned first upon the personal estate of *Mr. La Noy*; and if that is deficient, then upon the copyhold estate devised by him, subject to the payment of his debts; and this because there is a covenant in the settlement, that in case his wife survive him, his heirs, executors, or administrators, shall pay to her, for her life, the five hundred pounds a-year without deduction, except for land-tax; and that therefore this makes the five hundred pounds a-year a debt upon the personal estate, so as it ought to be satisfied, in the first place, out of that.

As to the five hundred pounds a-year, the objection is carried too far; though there is one kind of relief which I will mention just now; for though there is a covenant of such sort as binds the person as well as his land, yet it is truly said by the Counsel for the defendant, that the personalty was not the original fund chargeable with this annuity (a); and in that respect it differs from mortgages or other incumbrances upon estates; for if a man borrow money, and make a mortgage, with a personal covenant for the payment of the money, and also give a bond at the same time, there being in this case borrowing and lending, that which is the most natural fund for payment of debts shall be first applied,

(a) *Burgoyne v. Fox*, 1. Atk. 575. 222. *Edwards v. Freeman*, 2. Peer. Calton v. Hancock, 2 Atk. 435. Wms. 436. *Evelyn v. Evelyn*, 2. Peer. Coventry v. Coventry, 2. Peer. Wms. Wms. 664.

which

which is the personal estate, and the mortgage is no more than a security (a).

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But this application of the personal estate was never carried so far as to pay provisions for wives or children chargeable upon land, because the land is the primary or original fund, and whoever takes the estate must take it subject to such lien. Therefore upon the settlement in 1718, in consideration of marriage, which is a good consideration (b), *Mr. La Noy* settles a real estate of the value of one thousand pounds *per annum*, as he recites it, upon himself for life, with a rent-charge of five hundred pounds a-year to his wife for a jointure, and, subject thereto, to the heirs male of his body generally, with remainder to his own right heirs. Upon this first settlement, *Miss La Noy* should take this estate only as right heir to her father, and as such has no right to come against the personal estate, and out of that to disencumber the real estate of a debt brought upon it by these very settlements under which she takes. Suppose there had been a son, and he had taken it by virtue of the limitation to the heirs males of the body of *Mr. La Noy*, and so had taken *per formam doni*, he could not disencumber it out of the personal estate, because he takes it under the very settlement, subject to the mother's annuity, which is originally charged upon the estate itself; and it is so in all cases of portions for younger children: as if a man settle his estate for life, remainder to his wife for a jointure, remainder to trustees for five hundred years for younger children's portions, remainder to his first and other son in tail male, the eldest son cannot come against the personal estate to discharge his inheritance out of it; and there never was a decree, for he must take it charged; therefore the plaintiff, upon this part of the case, cannot be entitled to throw the annuity upon the personal estate in discharge of the inheritance, especially upon the first settlement.

Upon the second, there is no recital of the value of *Mr. La Noy's* estate; but in consideration of the subsequent fortune which came to the wife by the death of the father as a share of his personal estate, the husband levies a fine to destroy the uses of the former settlement, and makes a new one to himself for life; then to the intent that his wife may receive five hundred pounds a-year for her life as a jointure; then for a term of two hundred years to raise portions for daughters, *viz.* of six thousand pounds, in case there should be a son; or in case there should be only daughters and no son, with remainder to the heirs of his own body, with a remainder to his own right heirs. Upon this settlement *Miss La Noy* has no title to exonerate the real estate of this jointure of five hundred pounds a-year, by throwing it upon the personal estate, because she

(a) *Cope v. Cope*, 2. Salk. 449.
Meynell v. Howard, Prec. Ch. 61.
King v. King, 3. Peer. Wms. 358.
2. Atk. 496. *Tankerville v. Fawcett*,
2. Brown. C. C. 57. *Ward v. Dudley*,

2. Brown. C. C. 316. *Billinghurst v.*
Walker, 2. Brown. C. C. 604.
(b) *Ex parte Marth*, 1. Atk. 158.
Brown v. Jones, 1. Atk. 196.

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does not take as a purchaser by virtue of the uses of this marriage-settlement ; for, in the first place, it is a settlement after marriage ; and lastly, there is no covenant in regard to the inheritance to discharge it of this annuity : and as to the inheritance of the estate itself, she takes it under a general limitation to the heirs of the body of the father ; and if *Mrs. La Noy* had died, leaving issue a daughter, and after *Mr. La Noy* had married again, and had issue a son, the other son would have taken the estate before her ; which shews, she did not take as a purchaser under this marriage. BUT I AM OF OPINION, upon this second settlement, that there is an equity in *Miss La Noy*, the plaintiff, to turn the *Duchess of Athol*, in some degree, upon the personal estate of *Mr. La Noy* ; and that in relation to six thousand pounds provided by the second settlement for daughters portions, she shall stand, as to the personal estate, in the place of the *Duchess of Athol*, her mother, and be satisfied out of that.

As to this six thousand pounds, she takes it as the only daughter of the marriage, either as a purchaser of it by virtue of that consideration accruing to the father by the accession of the fortune of the mother, or, laying that out of the case, she is a child claiming a provision, and therefore in this court in the nature of a creditor. If that be so, What will be the effect in a court of equity ? In taking the account, there appears to be a great deficiency of near four thousand pounds, which, as has been observed, must run on as a burthen upon the ensuing profits, and upon the inheritance, with interest ; so that if the *Duchess* should live to grow old, nay only to arrive to a natural age, it will exhaust the inheritance itself, and so the six thousand pounds can never be raised, because the annuity is prior to it, and has swallowed up the estate which was the fund for it ; therefore it is incumbent upon the Court, as far as it can, to preserve both rights. The *Duchess* has two funds for her jointure ; the real estate, and a covenant for the payment of it by *Mr. La Noy*, his executors, administrators, or assigns, which raises a charge upon the personal estate ; and it is the constant course of this court, if there are two creditors, one having a double fund for his security, and the other only a single one, to turn the former to take his satisfaction out of that fund, in the first place, which the latter has no right to come upon, that the security of the other may be as little prejudiced as possible. Suppose a man seised of two real estates, make a mortgage of both to one person, to secure the sum of a thousand pounds, and afterwards makes a second mortgage of one of those real estates only to another, who has no notice of the former mortgage ; in this case the first mortgagee shall be compelled, in the first place, to take his satisfaction out of that real estate, which was not comprised in the second mortgage, in order that the second mortgagee may have his full benefit of the estate included in his mortgage ; and this though these two estates may descend into different hands, or to be settled different ways.

And

And I AM OF OPINION, that the plaintiff, *Miss La Noy*, to secure her own six thousand pounds and her maintenance of eighty pounds a-year (as they are charges upon the same fund with which *the Duchess* is a creditor, and prior to *Miss La Noy*), has a right to turn *the Duchess*, who has a double fund for her security, upon the personal estate, or upon the copyhold estate devised for payment of debts; and that as to the six thousand pounds and maintenance, she shall stand in the place of *the Duchess*, and have her satisfaction out of the real estate. The case I have mentioned, and several other cases, are proofs of it; there is also a strong case to this purpose in *1. Vern. 219. Reeve v. Reeve*, and the same case in *2. Vent. 363.* where *Sir Richard Reeve* charges his lands in *B.* with a portion of three thousand pounds for his daughter by a former *venter*, and then marries a second wife, and makes her a jointure of half the lands at *B.* without taking notice of the charge of three thousand pounds; and afterwards thinking the portion would defeat the jointure in *B.* takes notice thereof, and devises to his wife other lands in *D.* in lieu of her jointure in *B.* and dies. She and the son and heir agree together to defeat the daughter of her three thousand pounds; and therefore the wife, finding that the settlement which was made on her marriage, though subsequent in time, would prevail against the three thousand pounds charge, which was voluntary and fraudulent as to her, adheres to her jointure, and refuses to accept the devise; and the daughter's bill was to be relieved: and the Lord Keeper decreed, that the plaintiff should hold such part of the lands in *D.* as should be equal in value to such of the lands in *B.* as were comprised within the jointure until her portion was raised. Now this was putting the daughter in the place of the mother so far: and it was stronger than the present; for the charge there for the daughter was only voluntary, and not for a valuable consideration, as here; and the decree there was upon the same foundation as here, which was to preserve the rights of both parties.

The next question relates to the eighty pounds a-year maintenance for *Miss La Noy*; and as to that there is no ground, as it stands originally upon the foot of the settlement, to say, that it can be a charge upon the personal estate, for there is no personal covenant for the payment of it; but the maintenance will stand upon the same foundation as the portion, which is, that the fund not being sufficient for both, and the mother having a right to come upon the personal estate, the daughter shall, *pro tanto*, stand in her place.

It has been objected, that the mother ought not to have this whole eighty pounds a-year for the maintenance of her daughter, especially in her tender years, when she could not be supposed to lay out half so much upon her; and that by the law of nature she ought to maintain her out of her own estate. But this is carrying the point too far, and the mother must have the eighty pounds a-year, because she has maintained her child. In case where a

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legacy is given to a child for a portion, and not made payable till twenty-one, and no expressions in the will for it to bear interest in the mean time, the mother, even there, shall not be obliged, out of her own bounty, to maintain her child ; but this Court will construe the legacy to bear interest, upon a presumption, that as the testator intended it as a portion, he must necessarily intend it to bear interest ; otherwise the poor child, in all likelihood, will starve in the mean time.

The utmost that the Court does in cases of maintenance is, where there is a large estate which comes to an elder son, and there is no provision for daughters or younger children, the Court will order a larger provision for such elder brother, that the children may have a maintenance out of that, upon a presumption, that if the elder brother was at age, he would be the housekeeper of the family, and would make his younger brothers and sisters welcome, as his Lordship expressed it, to a running in his kitchen.

As to the question relating to the stocks standing in the joint names of the husband and wife at the time of the death of *Mr. La Noy* the husband, the case is thus : *Mr. La Noy* married *Mrs. Frederick*, the present *Duchess of Athol*, when she had no portion ; and in consideration of marriage, makes her a jointure of five hundred pounds a-year. After the marriage, by the death of *Mr. Frederick* her father, who, by a decree in this court, was construed to be a freeman of *London*, she became intitled to a fifth share of the orphanage part of his personal estate, which share this Court ordered to be transferred to *Mrs. La Noy*, and not to the husband. But however the stocks, to the amount of fifteen thousand pounds, were transferred to them in their joint names. By this, the husband had a power over the stock so as to reduce it into possession ; but as it was a *chose in action*, and he had not altered the nature of it, by his death the wife had a double claim : the one, as it was a *chose in action* in her right unreduced it would belong to her, and not the personal representatives of her husband ; the other, that as it was in their joint names she took it by survivor. This, to be sure, would be the law if nothing further had been done ; but the case does not rest here ; for after the augmentation of fortune in right of the wife, *Mr. La Noy* makes a second settlement, wherein he recites that *Mrs. La Noy* was entitled to long annuities, and other personal estate of her father, to the amount of fifteen thousand pounds, and that he, in right of his wife, became intitled to them ; in consideration whereof he revokes the uses of the former settlement, and as an augmentation thereof settles the long annuities of three hundred pounds a-year to her for life also, remainder to his first and every other son in tail male, &c. subject to a term to raise six thousand pounds as a portion for younger children. After this settlement, *Mr. La Noy* dies in the life-time of his wife, leaving these joint stocks untransferred and unaltered ; so that in point of law they vest in the wife by survivor. But the plaintiff insists, and the same point was insisted upon for her at the original hearing before LORD KING, that though they are survived to the wife at law, yet she is to be considered only as trustee of them, for the benefit of the personal
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representatives of the husband, who are become purchasers of them, and of all the wife's fortune, by the last settlement made by the husband in consideration of her accessional fortune.

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I had at first some doubt upon this head ; but upon looking into the cases I AM OF OPINION, that I cannot carry this doctrine so far as the plaintiff insists, *viz.* to have these stocks considered as part of the personal estate of the husband, and to take them from the wife. There have been several cases where a wife has been intitled to a portion, and before marriage (the wife being of age upon agreement with her, or the wife being under age with the consent and agreement of her father, trustee, or guardian), the husband has made a settlement upon her in consideration of or previous to such marriage, and in consideration of her portion, which consisted in *chofes in action*, and the husband has died without reducing them into possession, this Court has decreed in favour of his representatives against the wife ; much more would it do so in favour of creditors, for the increase of the husband's personal estate. And this has gone so far, that where the settlement made by the husband could not be said to be an adequate one to the wife's fortune, yet as it had been the agreement of the parties, and the portion had been the motive of the settlement, the representatives of the husband have been decreed the portion against the wife. But all these cases are of settlements or articles before marriage for valuable consideration, and not where they have been either voluntary, or the wife under coverture ; and in the general cases the settlements have not been adequate to the fortune ; and that expression is only made use of where the general doctrine is laid down ; and where you examine strictly the cases, the settlement has not been adequate ; and yet the settlement has prevailed so far as to make the wife a trustee of her own *chofes in action* in favour of the husband's representatives. The present settlement is upon a very great accession of fortune made after marriage, and during the coverture ; and if this settlement is to be tried by the rule laid down, of its being an adequate one, it is plain it is not, for the husband settles nothing new, but only a provision of six thousand pounds for daughters ; the lands settled are barely the lands settled before ; the jointure of the wife is only increased by three hundred pounds a-year out of long annuities only, which were her own estate. This is, indeed, a provision, but does not come within the meaning of this rule when the Court says the settlement is to be adequate. But that is not the thing I rest upon ; for this is a voluntary settlement, and after marriage, and therefore no contract which is binding upon the wife, she being a *feme covert*, and unable to contract ; and there were no persons, father or other trustee, to contract for her ; the mother indeed is party to the settlement, but she had no power to agree for her. If this settlement had come before this Court, it would have gone before the Master to have received proposals for such a settlement, and she might have been examined in court, or before the Master, to express her consent to the settlement, and to the husband's having her fortune, in the same way as a woman who is married is examined apart upon her levying a fine.

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Now this way the wife might have been bound by the settlement (a), and the husband's representatives entitled to these *chofes in action*. But to say she is bound by this settlement, by which she takes nothing, except out of her own portion, without the intervention of this court, is carrying it further than any of the cases. If you look into the case of *Adams v. Cole* (b), which is the strongest that can be mentioned, the provision there, indeed, made for the wife was not adequate, but it was an agreement before marriage, and also a bond given by the husband in consideration of marriage, and therefore an agreement when the wife was capable of contracting. And in that case my LORD TALBOT lays it down over and over, that it was the agreement of the wife, though no adequate settlement; that the wife, before matrimony, was capable of bargaining, and of parting with her fortune, upon what terms she pleased; and that she was bound by it; which holds not in the present case. And the present case is stronger from the intent of the parties. The recital was, that *Mr. La Noy* was intitled to this stock in right of his wife, and he takes the transfer to himself and wife jointly; he had it in his power to reduce or sell these stocks if he thought fit. His being intitled in right of his wife to these stocks, though he was only to have the benefit of them for his life, would be a good consideration for this settlement; and he might intend, by taking the transfer jointly, to have it in his power to sell these stocks, or, if he did not, to leave them to the direction of the law to survive to his wife; and I will not take them from her in opposition to the intention of her husband.

-AND HIS LORDSHIP DIRECTED an account of what was due for the portion of six thousand pounds, and also for the rent-charge of five hundred pounds a-year: he also directed the estates to be sold, and, with the consent of the defendants, ordered a value to be set on the annuity of five hundred pounds; and that the money arising by such sale or sales should, in the first place, be applied to pay the value of the said annuity, and, in the next place, the arrears of maintenance, and then the portion of six thousand pounds and interest; and in case the money arising by such sale shall not be sufficient to answer the six thousand pounds and interest, then the plaintiff is to stand in the place of the defendant the *Duchess of Athol*, to have the benefit of the covenants contained in the settlement of 29th January 1718 for payment of the annuity, and by virtue thereof to receive a satisfaction for the deficiency of her portion of six thousand pounds and interest out of the personal estate of her father *James La Noy*; and if the personal estate should prove deficient, then out of the freehold and copyhold estate devised by the will for the payment of debts.

(a) *Willats v. Cay*, 2. Atk. 67. *Dimmock v. Atkinson*, 3. Brown C. C. Oldham v. Hughes, 2. Atk. 454. 195.
Milner v. Colmer, 2. Peer. Wms. 642.
 (b) 2. Eq. Abr. 143. *Cases Temp.*
Frazer v. Baillie, 1. Brown C. C. 518. Talb. 168.
Minet v. Hyde, 2. Brown C. C. 663.

The Attorney General *against* Baliol College, Oxford. Case 139.*In Chancery, December 11, 1744.*

HARDWICKE, *Lord Chancellor.* In this cause, which is brought here by the principal and regents of the university of *Glasgow, in Scotland*, in the name of THE ATTORNEY GENERAL, there are two sorts of relief prayed against the different sets of defendants, which are two: The one the master and scholars of *Baliol College, in Oxford*, in their corporate capacities, the master and six senior fellows of the same college in their natural capacities as trustees, the vice-chancellor of *Oxford*, the provost of *Queen's*, the president of *St. John's*, and the master of *Baliol*. The other set are, the representatives of *Mr. William Spinks*, in relation to a lease taken of the contested lands, and afterwards assigned to him: and there are the trustees of the original lease, as also other persons brought before the Court, against whom no relief is prayed.

Case on a bill against the trustees of *Mr. Snell's* charity, praying an account of the funds, and that the court of chancery will direct the manner in which the objects of the charity should be subsequently pursued.

As to THE FIRST SET, there are two kinds of relief asked: The first, to have a general account taken from the beginning of the rents and profits of the charity-estate, and how they have been applied for the benefit of the charity; and that such parts as have not been applied may be considered as so much money in the hands of the college to be applied to the charity. The other relief prayed against them is, to have the direction of this Court for the establishment and regulation of this charity for the future: and this last is not opposed by any of the defendants.

As to the first head of relief, it must be considered upon the will of *Mr. Snell* in 1672, at which time, by the laws of *Scotland*, episcopacy was the established constitution of that Church; and by that will *Mr. Snell* devises some annuities for lives, which are since fallen in, and some legacies, which are paid; and then gives the residue of his estate to trustees, and directs them to convey and settle it upon five or more persons, and their heirs, to be nominated by the vice-chancellor of *Oxford*, the provost of *Queen's*, the president of *St. John's*, the master of *Baliol*, or any three of them, upon trust, that the profits and produce shall be applied for the maintenance of a number of scholars born and educated in *Scotland*, who shall have spent two years at least as students in the university of *Glasgow*, or one year there, and two more in some other *Scotch* university; and such scholars are to be entered of such college or hall in *Oxford*, and to have such exhibitions or allowances as the said vice-chancellor, &c. or any three of them, shall appoint. The number, indeed, of scholars is directed not to be under three, and not to exceed five, unless the produce shall reach to maintain more. Such scholars are also directed to be bound in proper security, upon their admissions, to forfeit five hundred pounds a-piece if he shall enter into holy orders in *Oxford*, and shall, after such admission into his holy orders, accept of any spiritual promotion either in *England* or *Wales*, "it being my will and desire, that every such

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"scholar shall return into *Scotland*, to be preferred there as his "merit shall deserve." The college of *Glasgow* are to recommend scholars to the vice-chancellor, &c. upon any vacancy under the college seal; and no scholar is to take benefit of the exhibitions above ten years. That such scholars, before admission, shall be probationers for six months at their own expence. Three of the best scholars are to have an extraordinary premium of five pounds a-year a-piece, five pounds a-year allotted for a dinner, and ten pounds a-year to the register, who is to make the securities.

Since this will, and before the charity came to be established in this court, the Church of *Scotland* was altered, and presbytery restored. Upon this accident, I had some doubt how far this will could be carried into execution, because of the state of the *Scotch* Church; for the bond was to be given upon condition not to take any spiritual promotion in *England* or *Wales* after admission into *holy orders* in *Oxford*. "Holy orders" in the will must mean episcopal, for those were then the holy orders which prevailed in *Scotland*; and it would be an absurd thing for a person to receive presbyterian orders at this time in *Oxford*. But I am delivered from that doubt, because, upon looking into a decree made in 1691 by the lords commissioners of THE GREAT SEAL, which was the original decree, and which is recited by LORD SOMERS in a later one, I find this very objection insisted upon against the charity by the heirs at law of *Mr. Snell*, where they urge, that the Church of *Scotland* had been altered by two acts of parliament; that instead of episcopacy presbytery now prevailed, which made the execution of the charity impossible; and that therefore there was a resulting trust for the heirs at law. But by the decree of the Lords Commissioners it is declared, that the defendants, the heirs at law, could take nothing, nor ought to have any benefit by the testator's will. And therefore an account was decreed; and after it was taken, there were directions given for the regulation of this charity, which will now fall under the consideration of this Court. Besides, the heirs at law have acquiesced under this decree ever since. And the directions complained of are, that the surplus of profits, after maintaining a particular number of exhibitions, is to go to *Baliol College* for the benefit of the library, which the scholars are to have the use of; that the trustees shall have power to make leases at the clear yearly rent of three hundred pounds, for any determinate time not exceeding twenty-one years; that that decree shall be subject to such farther alterations and amendments as shall be properly required; and the trustees are to be indemnified under that decree.

Charity.

The best way to regulate charities is to have schemes laid before the Master.

These directions are loose, and too general; and the best way would have been, to have sent it before the Master to accept a scheme, upon which things would have been considered more minutely and exact. However it appears, that in the year 1699, at farthest, complete notice was given of this decree by the matter and scholars of *Baliol* to the heads of the university of *Glasgow*, and a demand made to them to recommend scholars pursuant to the will

will and the decree; and in the instrument of notice and demand there is a recital of the decree itself. Thus it has rested from that time to the filing of this bill; and the first relief prayed by it is, to have a general account from the time of the will; but that is inconsistent with that decree. But the university of *Glasgow* objects to the validity of the decree itself as against them, that it cannot be conclusive upon them, because they were not parties, and that the directions are not conformable, but repugnant, to the will of the donor. As to their being not parties, that will not avail them much; for that information was not brought in a collusive secret manner, but in the name of *Sir George Treby*, attorney-general, at the relation of the vice-chancellor of *Oxford*, &c. The defendants were the heirs at law, the widow and trustees under the will. *Glasgow* indeed was no party, nor indeed were the plaintiffs obliged to make that University party, for it is a corporation, and out of the kingdom and reach of the process of this court, which is always an excuse for not making them parties: therefore that is no objection to make this a void decree as to them. And the Court was so cautious as to reserve liberty to make any alterations in the decree; perhaps for this reason, because, as *Glasgow* could not be a party by compulsion, that nevertheless it might apply by petition to have any amendments in the decree: but that they omitted to do till very lately, although they had notice of it from 1699, and knew the advantages which *Baliol* claimed from it, and though they had so easy a method to do it in as by petition.

The other objection is upon the merits of the decree itself, that the directions are improper, and not agreeable to the will of the giver, because there are liberties given for leasing the estate at the clear rent only of three hundred pounds a year, and the surplus of the rent, above maintaining a certain number of exhibitioners, is to be applied for the benefit of *Baliol College*, as a reward for the exhibitioners making use of the college library. Perhaps without some advantage to the College, it might be difficult to prevail with the College to accept of such a by-foundation as this to entertain six or more members who had received their first education for two or three years in a *Scottish* university, and, at the time of the decree pronounced, differing from the principles of *Baliol College*, the one owning episcopacy, and the other presbytery; and *Baliol College* might be right in insisting upon some advantages to themselves: nor is this disagreeable to the will; for *Mr. Snell* has given his estate to the charity at the direction of the vice-chancellor and several heads of houses in such university, and in such manner and proportion as they, or any three of them, should appoint; and they appointed the surplus profits to be applied as above.

As to the going into the general account, I would not suffer a retrospect without the allowance and assent of *Baliol College*, although there was more reason to complain than appears in the present case; and as to such general account backwards, there is a difference between a College and natural persons, for a College is a

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Parties to bills. No need to make people parties to a bill who live out of the process of the court; and a decree will not be void against such persons, though they are not made parties; but it is usual, in such cases, to reserve liberty to apply for further directions, that persons out of the process of the court may not be quite concluded, but may have liberty to apply for alterations in the decree by petition.

Account. Colleges not obliged to account so strictly and so far back as common persons are.

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various fluctuating body, who receive their revenues for their daily maintenance and support, to eat, and drink, and maintain the College. The money is used, and the persons who so applied it are perhaps dead; and I shall not suffer *Glasgow* to call any money out of their hands for so far back as they have acquiesced under their proceedings, for above forty years.

College made a
lease, the rent
subject to taxes;
the tenant by
mistake did not
deduct them;
equity will not
allow him those
already paid, nor
decree the ac-
count back.

I remember LORD MACCLESFIELD's taking such distinction. A College before the restraining statutes had made a very long lease upon a reserved rent, and the College was to pay the taxes; the tenant, by mistake, had paid them for a great many years, without deducting them from his rent, and thereupon brought his bill to have an account of them, and an allowance of them from the Revolution, which was a good many years back. LORD MACCLESFIELD was clearly of opinion, that the taxes were to be deducted out of the rent, and decreed that the tenant might deduct them for the future, but would not make an allowance backward, but refused directing the account, because the College had lived upon their whole revenue, and the money was spent upon the repairs or other necessary demands of the College. Therefore, as to this part of the case, I am of opinion, that from the time of making to the filing the information the account must be upon the foot of the decree. But I am of opinion, that if the exhibitions have not been filled up, the money that should have been applied for that purpose shall not go to the benefit of the College of *Baliol* as a surplus; though I should not take notice of any small vacancy, as for a month or two.

The other relief prayed is for the regulation of the charity. It seems the charity estate is much increased in value; therefore all parties may propose schemes to the Master, and then it will come more maturely before the Court.

As to the other set of defendants, who are the representatives of *Mr. Spinks*, there are two sorts of relief prayed against them. The first is, entirely to set aside the lease now in being at three hundred pounds a-year clear rent, and for a fine of fifty pounds, with a clause in the original lease for nine successive renewals at the end of every seven years, the fine to be each time; so that the lease would not expire till 1777.

The last relief prayed is, that if the relators cannot prevail to set aside the lease entirely, then to be relieved against the clauses of renewal at least, and to have the lease set aside so far, and the covenants for renewal expunged.

As to the first point, of entirely setting aside the lease, there is no sufficient ground for that, and it would be a cruel case to do it. The reasons alledged for doing so are, first, that the lease is contrary to the will; and, secondly, to the decree. As to its being contrary to the will, that has not established any particular manner of leasing, but the trustees were, to be sure, obliged to lease it most beneficially for

for the charity. The decree, indeed, directs a particular method of leasing, at a rent of three hundred pounds a-year, clear of taxes, and for as large fines as could be got, and for a term of twenty-one years. The first lease was a clear rent of three hundred pounds for twenty-one years, and the fine five hundred pounds, with a perpetual covenant of renewal. That lease went doubtless too far, and was not warranted by decree; but afterwards the College of *Baliol* and the trustees thought fit to reduce that covenant to one for nine renewals at the end of every seven years; and those are granted upon a recital of large improvements begun to be made and continued by the lessees. As to the setting aside this lease entirely, it must be admitted the lessees had notice of both the will and decree. The decree is recited in the lease, and that recites the will, and so there is complete notice of both. But the lessees have a good legal estate. The consideration might have been different if they had had only a defective one at law, so that the trustees could recover at law, and turn the lessees into equity to establish the lease, by having the defect supplied; and there perhaps the Court would not do it; but the lessees having a good title at law, they have no need to be suitors to this Court, but instead of them the trustees must be obliged to come into this court to be relieved against this lease; but that must be upon equitable terms; and though the Court would do equity in setting aside this lease in favour of the charity, yet it will not decree cruelties against the lessees. Suppose the lessees took this estate, and the trustees granted it for the sake of great improvements upon it, which is the lease, though there is no evidence from the lease of the precise sum or terms imposed, yet there is proof that the lessee has laid out above four thousand pounds, and inclosed a deal of common unprofitable, inasmuch that the value of annual income is increased from five shillings to be worth seven shillings an acre, which is an exceeding meritorious consideration, and ought not to go totally to the benefit of the charity. On the part of the representatives of *Mr. Spinks*, the lessee, it is objected, that the university of *Glasgow* ought not to be relieved against this lease, because they stood by and suffered the lessees to make these improvements upon the charity estate without discovering their title; and that this was like the case where a man suffers another to build upon his land, and stands by, and makes no objections, or shews his own title: and there have been some few cases adjudged upon that point; and the maxim in such cases is, *Solum cedet ædificio*. But that is not the present case; for those decrees have been where a man builds upon another's lands, having no title; but here the improvers had title at law, and were lessees of the estate; and the landlord was not obliged to give notice to the lessees not to improve, and was guilty of no fault in omitting it, for the lessees might improve as they pleased.

there, as lessee, &c. has, for the landlord need not to give notice

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Equity makes a great difference where a man is plaintiff or defendant in that court.

If a lease or grant is good at law, equity will not set it aside without allowing for lasting improvements.

If a man build upon another's land, having no title to it, and the owner is passive, and stands by without giving notice of his title, the builder shall have the land in equity; for there *solum cedet ædificio*; but such builder must have no title or colour of title to build in such cases.

But

If conveyance is set aside for fraud, it was good at law, and the grantor was obliged to come into this court, he shall not be relieved without doing equity by allowing lasting improvements, &c.

So in the case of turning absolute conveyances into securities for the money advanced only.

But still the question recurs, To what relief the charity is intitled? *Mr. Spinks* must be allowed a reasonable recompence for his improvements; and in case the five remaining renewals will amount to no more than a reasonable satisfaction, he ought to have the benefit of them. The trustees come here to set aside this lease, which is good at law; and as they are obliged to be plaintiffs in this court, and can have redress at law, they must have relief upon equitable terms only: as, suppose a man comes here to set aside a conveyance for fraud, if the grantee has made lasting improvements, the Court will do him justice, and let him have satisfaction for them. So there are many cases where absolute conveyances have been taken, and yet this Court, upon bills, has turned them into securities for the money advanced only; and there the Court allows for lasting improvements, and will not let the other party run away with the expence out of another's pocket: and this is always the case where a party has no remedy at law, but is obliged to come for relief here.

Therefore I SHALL DIRECT, that the Master enquire what lasting improvements have been made and money laid out, and how much the annual value of the charity has been increased by the lessees; and to enquire, what was the just and real value of the lease when first granted in 1694 to be then purchased, consideration being had to the continuance and renewals; and then, when this is stated, it will appear whether the lessees have had sufficient satisfaction or not; for the Court will take care that they have justice done them.

Case 140.

Bedford against Gibson.

Michaelmas Term, 17. Geo. 2.

In what cases voluntary annuities charged upon the real estate shall be postponed in payment to debts due to the bond and simple contract creditor of the deceased grantor of such annuities.

THE LATE *Duke of Wharton*, being a young nobleman of immense fortune and of a finished taste in polite learning, having a great affection for *Dr. Young*, in 1719, by grant, reciting, that the improvement of the polite arts and sciences was of public utility, and that *Dr. Young* had made great progress and advances in them, in reward, therefore, for his endeavours, he granted him a rent-charge out of his estates of one hundred pounds a-year for his life, with an express clause of distress. In 1721, the *Duke* vests his estate in trustees by sale, &c. to pay all his debts. By another deed, reciting the former grant to *Dr. Young*, and that the *Duke* stood indebted to *Dr. Young* in two hundred and fifty pounds, and that *Dr. Young* did, some time since the former grant, at the instance and request of the *Duke*, quit the place and service of my Lord *Exeter*, and thereby lost an annuity of one hundred pounds, and whereas the *Duke* was willing to make him some amends for such loss, he grants him a second annuity or rent-charge of one hundred pounds more for his life out of his estate, with like power of distress. And it was in proof, that *Dr. Young* did live in the family of my

Lord

Lord Exeter, and that he quitted it to go to the *Duke of Wharton*; and that this was the consideration of this second grant is under the *Duke's* own hand and seal. In 1725, the *Duke* makes a second general deed of trust of the surplus that should be in the hands of the first trustees, in order to pay all his just debts.

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THE QUESTION was, Whether both or either of those annuities to *Dr. Young*, being charges out of and affecting the land, should be preferred to the bond or simple contract creditors of the *Duke* for valuable consideration? or, Whether they or either of them should be postponed to such bond or simple contract creditors for valuable consideration?

MR. ATTORNEY GENERAL argued against *Dr. Young*, that indeed both his annuities should be charges upon the surplus of the *Duke's* estate in the hands of his representatives; for though the annuities are voluntary, yet they shall not be set aside by the grantor or his representatives, unless for fraud; but notwithstanding that, they shall be postponed to creditors for valuable consideration: that this is like the case where a man dies indebted by bond and simple contract for valuable consideration, and has also given voluntary bonds; though at law such voluntary bonds shall be paid equally with the bonds for valuable consideration, and shall be preferred to simple contract creditors for valuable consideration, because the courts of law do not enquire into the actual consideration, but as it is a deed or specialty under the hand and seal of the party, presume the consideration to be valuable, yet in this Court they shall be postponed even to simple contract creditors for valuable consideration, upon this ground of equity, that a man must pay before he can give, and must be just before he will be permitted to be bountiful; and though they shall be postponed to real debts, yet they shall be charges upon the executors, if they have assets to pay them: and the law has been so held ever since the decree of my LORD HARCOURT, in the case of *Jones v. Powell* (a). Which THE CHANCELLOR admitted.

But the first grant to *Dr. Young* is voluntary; for although it be true, that *Dr. Young* has made great improvements in the politer sciences, and though they are of great use, yet that is no reason why a particular person should pay him for this, and give a voluntary annuity in preference of his real creditors, for no particular consideration moved to the *Duke* more than to any other person; and if such grants as these should prevail, real debts would never be paid, for insolvent persons would be always defrauding them by such grants. The considerations of love or friendship to strangers import a deed to be voluntary, though in the case of a child it is otherwise, because his parent is bound to provide for him. That the second grant is not much better. The considerations are not adequate to the annuity of one hundred pounds for life; for the loss of the salary in *Lord Exeter's* family was precarious, was to

(a) 2. Eq. Abr. 24. 143.

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exist during liking, and at furthest would not be continued beyond the education of the young noblemen. That though this Court does not weigh considerations minutely, yet where considerations are very small, they are badges of fraud; and there is a difference where a value can be set upon a consideration and where not: as where a marriage is concerned, or a family-settlement to be made, one cannot state or ascertain the consideration by saying, "You shall give so much or so much;" and there the Court will enter into the adequateness of the consideration. In the present case the consideration is not adequate, and therefore will relieve against this charge, and only let it stand as against the creditors for valuable consideration as a security for two hundred and fifty pounds lent, and interest.

MR. SOLICITOR GENERAL, for *Dr. Young*. The question is, Whether these deeds are void by the statutes of *Elizabeth*? And the same determination will be in this court upon those statutes as there would be at law; for the reason why the question comes here is, because the fund appointed for payment of the creditors is vested in trustees. The postponing of voluntary bonds in this court to simple contract debts, where they are to be paid by executors or administrators out of legal assets, is not applicable to the present case; for these are not bonds, nor are they payable out of legal assets, but they are charges issuing out of real estates, for the payment of which there is a provision made by estates vested in trustees. And upon the statutes of *Elizabeth* there will be two considerations: The first, What considerations they are which those statutes require in deeds to prevent their being fraudulent and void as to purchasers and creditors for valuable consideration: The last, Whether these deeds have such considerations as will support them.

It is by no means necessary, under these statutes, that the consideration of a deed must be money, nor that it must be such a consideration as will entitle the party to an *assumpsit* at law. And where the consideration is *quid pro quo*, it is not necessary that the thing parted with should be adequate to the thing given, as appears from 2. *Leo.* 70.

This case does not prove what it was cited for; though the Solicitor General said, the second jointure may double the value of the first; but this does not appear from the case. Neither the word "money" nor "voluntary" are used in the whole statute, but the words go throughout to fraudulent and collusive conveyances to defraud creditors. In *Lord Teynham's Case* (a), LORD HALE says, that in the construction of the statute of *Elizabeth* three things are to be considered, fraud, consideration, and *bona fide*; and that *bona fide* is opposite to fraud; that though there be no money consideration, yet it may be no fraudulent deed; and a

(a) 1. Mod. 119.

deed may be voluntary, and yet not fraudulent. The latter resolutions, I must own, are contrary to this last part.

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That as to the second point, Whether the consideration supported the present deeds : As to the first deed, the grant is by no means unbecoming the *Duke of Wharton*, who was a young nobleman of great quality and vast estate, a great genius, had a tincture for letters, especially polite literature, wrote himself, had read much classical learning, desirous of fame, and upon his coming into the world ambitious to be the patron of learning and learned men. It is said, indeed, that as the consideration of the first deed was *Dr. Young's* public performances, that could not raise a sufficient meritorious consideration to the *Duke*, because every member of this kingdom received equal entertainment and benefit from such performances as the *Duke* did. That may be untrue ; and though the deed shall not prevail if any person rewards another for any labours which serve the public, yet if it engages him to spend his time in any branch to serve the public by the temptation of a salary, that will raise a valuable consideration, so as to support the deed, in the same manner as if he had engaged him to employ himself for the grantor's own private benefit.

HARDWICKE, *Lord Chancellor*. The question is, Whether these annuities, or either of them, ought to prevail against the bond or simple contract creditors for valuable consideration ? Upon this there has been one original point mentioned at the Bar, which this case has been improperly compared to, and treated as though it was upon the same ground, which is this : The Court of late years has established this rule to postpone voluntary bonds or debts to those for valuable consideration, and it has been adhered to ever since the creation of it by LORD HARCOURT, in that case of *Jones v. Powell* ; and the rule is limited : as where a man owes debts by bond or simple contract for valuable consideration, and afterwards gives voluntary bonds, and dies, the latter shall not only be postponed to the bonds, but even to the simple contracts for valuable consideration, which shall be first paid out of the legal assets by the executor or administrator ; but the voluntary bond is to be paid by the personal representatives out of the surplus, if there remains any. But this rule has never been extended beyond that case of payment out of legal assets by an executor or administrator, and so does not come up to the present case ; for these are not demands of debts out of legal assets, but of rent-charges granted by deed out of the land, and such as at law affected the *Duke's* estate at the time when they were granted, for the first was granted considerably antecedent to the first deed of trust, and was a charge upon the estate. As to the last, though it was granted after the *Duke* had parted with his estate to trustees, yet he had an equitable estate in the surplus, and it was a charge upon that. So that I AM OF OPINION, that this is not a case within that rule of this court as to the administration of assets ; for there, none of the creditors having a specific lien upon the assets, they all stand in the same light. And this

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Court has a more extensive power over them than in this case, where the annuities are specific liens upon the land out of which they issue.

The true question between the parties is upon the statute of *Elizabeth*, Whether upon both or either of these deeds, which are grants of rent-charges, there are such considerations as will support them against subsequent creditors, or purchasers for valuable consideration? The two deeds will fall under different considerations.

The first deed is that of 1719, and the consideration appears upon the face of it; which I agree is an honourable consideration. It has generosity, it has everything in it which becomes a great man: but I should go much farther than this Court ever has done to say it is such a valuable consideration as the statute intended. If the consideration had been, that *Dr. Young* had been invited by *the Duke* to instruct him, although of full age, yet if *the Duke* had received instructions, and *the Doctor* spent his time, even his company would have been sufficient upon the statute of *Elizabeth* to have supported the deed against the creditors; for whether a man gives his money, his learning, or his time, it is a sufficient consideration; but nothing at all of that sort is proved, nor does it appear upon the deed, for that is general, for the love which he had for *Dr. Young's* great abilities and improvements in the politer arts. And the consideration had been as meritorious if he had granted an annuity to him in consideration of his great learning, or of his being a relation to him, or of blood; all which are honourable considerations; but they are not such as will prevail against creditors or purchasers upon the foot of that statute. Supposing then this deed to be voluntary, yet the Counsel say it is not void by the statute, because it is not fraudulent. That might have been so held formerly, but the later resolutions are all to the contrary; for it is now a sufficient reason to set aside deeds or grants in favour of creditors and purchasers because they are voluntary, without any proof of fraud, for the presumption amounts to proof; and though voluntary gifts or charges have been created, yet they shall not stand in the way of future creditors, although they have express notice of such gift before their purchase, mortgage, &c.

Eq. Abr. 334.
Pl. 6.

The Counsel for *Dr. Young* have recourse to another point to preserve the first deed, and say, that although the considerations expressed upon the face of the deed are voluntary, yet there was an extrinsic consideration, which is a valuable one, although it is not expressed upon the deed; and they have entered into proof of it; and that is, his leaving *Lord Exeter's* family, and the provision of one hundred pounds a-year made for him there, to come and live with *the Duke of Wharton*. But as to this part of the case, it is in the first place doubtful, whether this proof can be let in upon this deed; and, in the next place, it is clear, that the proof does not bring this fact to be the consideration of this grant. As to the admission

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admission of this proof, the deed has an exprefs consideration, viz. "the improvements *Dr. Young* had made in the polite letters;" and the deed does not add, "for other good causes and considerations:" and the general rule is, that where exprefs considerations are mentioned in a deed, and no general words, "as for divers other good causes and considerations," there no proof can be admitted of any extrinsic consideration, although it may be consistent with the exprefs consideration of the deed. But suppose this proof could be entertained, yet the proof will not avail *Dr. Young*; for though *Mr. Carew*, who is the only witness upon it, establishes the fact that *Dr. Young* lived at *Lord Exeter's*, and had an annuity of one hundred pounds, and that he left that family to come and live with *the Duke*, yet he does not prove that that fact was the consideration of this grant to *Dr. Young*. And upon the whole I AM OF OPINION, that this first grant can by no means be established against the creditors of the *Duke of Wharton*, although they became so subsequent to the grant. But

As to the second grant I AM OF OPINION, that there appears a sufficient consideration to support it upon the statute of *Elizabeth* against *the Duke's* creditors; and that consideration is sufficiently proved and established; for this recites the former annuity, and that the *Duke of Wharton* stood indebted to *Dr. Young* in the sum of two hundred and fifty pounds (being the arrears of the former annuity), and that *Dr. Young* did some time since, at his instance and request, quit and leave the place and service of *my Lord Exeter*; and thereby lost an annuity of one hundred pounds; and whereas he was willing to make him some amends, he gives him a further annuity, in consideration of the two hundred and fifty pounds, and of his quitting the *Lord Exeter's* service. This consideration is sufficiently proved; for *Mr. Carew* proves, that *Dr. Young* lived with *Lord Exeter*, and had such annuity there, and quitted it to go to the *Duke of Wharton*; and that that was the consideration of this second grant appears under the hand and seal of *the Duke*. Now this consideration is sufficient upon the statute of *Elizabeth*, for here is a loss on one side and an advantage on the other: and this second deed reciting that this annuity was granted as a compensation for the loss of *Lord Exeter's* service, excludes the presumption of the other annuity's being granted upon that consideration; for if it had, it would have said the second annuity was as a further or additional compensation. And this Court will not weigh considerations in very nice scales; for upon the statute it is sufficient if it be good and fair, though not an equivalent to the thing granted. AND I AM OF OPINION in the present case, that the arrears of two hundred and fifty pounds upon the first annuity would be a valuable consideration for the grant of a second; for the voluntary annuity was good against himself, and he might be laid in prison for the arrears, or his lands distrained upon for them; though the decree would perhaps be otherwise upon the administration of legal assets in the hands of an executor or administrator, for there a voluntary bond shall be postponed to simple contract creditors for valuable

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consideration. Suppose a man give a voluntary bond to pay money in two or three months, and the time expires, whereby the obligor is liable to be thrown into prison, and afterwards gives a new bond for the money, and has the old one delivered up, this new one cannot be called a voluntary bond, and yet if it is not to be performed as well as the former voluntary bond, it would annul all debts for valuable consideration; for the party need only to double-hatch his debt, and then it is secured to him effectually. But the present case differs, as I have said, from the rules observed in the administration of assets; for here it is a grant or charge out of a real fee-simple estate. THEREFORE I AM OF OPINION, that the first deed will not prevail against either the bond or simple contract creditors for valuable consideration, but that the latter shall take place of both; and that the former shall be paid out of the surplus in the hands of *the Duke's* representatives, if any remains.

Case 141.

Ex parte Turner.

Lincoln's-Inn Hall, Michaelmas Term, 18. Geo. 2. in the Matter of HANNAFORD, a Bankrupt.

In what cases
the court of
chancery will
not order a
bankrupt's es-
tate to be sold.

JOHN MICKLEMORE devised all his estate to a trustee and his heirs, subject to the payment of all his just debts. The trustee was indebted to *Turner*, the petitioner, in one hundred and seventy pounds by bond on his own account, and after the death of his testator borrowed two hundred pounds more to pay some of his testator's debts, and then made a mortgage of the trust estate to *Turner* for the whole sum of three hundred and seventy pounds, which is recited to have been lent to pay the testator's debts, whose will is recited in the mortgage. The trustee after this becomes a bankrupt, and *Turner* proved his debt before the commissioners.

Turner now petitions THE CHANCELLOR that the mortgaged premises may be sold for his benefit; but the creditors of *Micklemore*, the testator, oppose it, insisting, that as the mortgaged estate was devised for the payment of debts generally owing by the testator, they, upon the foot of the trust, ought to have an equal share with the petitioner, the mortgagee; and that if he lent money for the payment of the testator's debts, as he had notice of the trust in the will he ought to have seen the money applied.

Viner, " Pur-
" chaser," 119,
120, 121, 122,
123.
Eq. Abr. 358,
359.
2. Ch. Caf. 115.
1. Vern. 302.
2. Vern. 5.
Barn. Ch. Rep.
79, 80, 81. El-
liot v. Merry-
man.

HARDWICKE, Lord Chancellor. Where a devise is general, " in trust," or " subject to pay debts," the devisee may sell or mortgage, but he must pay the money to the creditors of his devisor; but if he do not, the mortgagee is not to suffer; for in cases of these general devises, he is not obliged to see to the application of the money he advances. But even in this case inconveniencies often arise; for where the estate is equitable assets, as it is where it is accompanied with a trust, the creditors who have not specific liens upon the land ought to come in equally and *pari passu*. However, if the trustee prefer one creditor to another where

he

he ought not, the remedy usually is against the trustee, and not the lender of the money ; for if the latter was to see the application of his money upon so general a trust, he could not safely advance his money without a decree in this court. But where the lender has been favoured in this sort, as not to be obliged to see the application of the money he advances, it has only extended to those cases where he has advanced it on the account of the devisor's debts only ; but here he has advanced money to pay the trustee's own debts. As therefore it appears that the mortgagee had notice of the trust, for it is recited in the very security to him, and knew that part of the debts were the debts of another person, and not of the devisor, he has not such an equity as will entitle him to relief. And in all cases where a mortgagee is intitled to relief in this summary way of petition, it is where the estate is clearly and properly the bankrupt's own, and not another person's, or subject to a trust.

I must therefore dismiss the petition, but without prejudice to any claim the petitioner may have, either at law or equity, on the estate.

Ex parte
TURNER.

Selwyn against Honeywood, et contra.

Case 142.

In Chancery, January 16, 1744, Lincoln's Inn Hall.

SIR ROBERT HONEYWOOD, the defendant's father, being concerned in several public commissions abroad, and being a great sufferer thereby, presented a memorial to the late king to that effect : whereupon his majesty signified to *Mr. Hawes*, the then receiver-general of the customs, to pay to *Sir Robert Honeywood*, during his office, the clear yearly sum of eight hundred pounds out of the profits of his office. *Mr. Hawes* was afterwards removed, and the plaintiff, *Mr. Selwyn*, made receiver-general in his stead ; and the late king signified the like pleasure to him : whereupon *Mr. Selwyn* gave a bond to the defendant, *Mr. Honeywood*, in the penalty of ten thousand pounds, in trust for his father *Sir Robert Honeywood*, the condition of which was, that *Mr. Selwyn* would pay to *Sir Robert*, the father, the yearly sum of eight hundred pounds, so long as he should enjoy the said office, or any other in trust for him or for his benefit. *Mr. Selwyn* made these payments regularly down to 1727 ; at which time he was removed from his office, and his brother *Henry Selwyn* succeeded him, and continued in the office till 1733, when *Mr. Eckershall* was appointed in his room, and is now in possession of the receiver-generalship.

A defendant is not obliged to disclose any fact which would tend to subject him to a corporal punishment or a pecuniary penalty, or endanger a loss of office.

Mr. Honeywood the trustee brought his action upon the bond, and *Mr. Selwyn* the defendant brought his bill for an injunction to the proceedings at law till the hearing of the cause in this court be obtained ; and in the same bill he prayed to be relieved against this bond. *Mr. Honeywood* brought a cross-bill to have satisfaction for all arrears of the annuity down from 1727 to the filing the bill, praying a discovery whether *Mr. Selwyn* during his time was any

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more than a trustee, and whether he himself had not the benefit of the office ; and also, whether *Mr. Eckershall* is now any more than a nominal receiver ; and whether he does account for the profits to *Mr. Selwyn*, who has not come to an agreement to allow him a salary for his trouble : and then insists, that the annuity still ought to be paid by the plain intention of the bond, *Mr. Selwyn* having the real benefit of the office. *Mr. Selwyn* by answer swears, that his brother had the office in his own right ; but as to *Mr. Eckershall* insists, that the discovery prayed would subject him to the penalties of one or more acts of parliament ; that he has heard, and believes, that *Mr. Eckershall* has enjoyed the said office ever since it has been granted to him ; that the defendant, *Mr. Selwyn*, is a member in the present parliament, and was a member during all the last parliament, and was so before the office was granted to *Mr. Eckershall* ; that as he was a member of both parliaments, and as the bond has been fully performed by his paying the annuity as long as he had the office, he insists, that he is not obliged to discover whether *Eckershall* receives the profits of the office for the use or benefit of the defendant, or whether he has come to an agreement with *Eckershall* about the profits of the said office. The plaintiff in the cross-cause had this answer referred for insufficiency ; THE MASTER reported it to be so ; and now, upon exceptions to the Master's report, it came on to be argued.

MR. ATTORNEY-GENERAL in favour of the answer, and against the right of a discovery, insisted, that as the plaintiff prays to discover whether the defendant has not the trust or beneficial interest in this office ; and as the defendant is a member of parliament, and ought not to have any office relating to the receipt of the king's customs held by anybody in trust for him, it being prohibited by several acts of parliament ; that he should not be compelled to make any such discovery, because it might subject him to the confession of a breach of an act of parliament : that the tenderness of the *English* laws obliges no man to confess from his own mouth such facts as would charge him either with a forfeiture or a penalty : and this rule receives great sanction in this court, for fear of perjury ; for a man's interest might, in many cases, oblige him to forswear himself rather than make discoveries prejudicial to himself. And he cited several cases to establish this general rule : as *Munn v. Stevens*, before the present Chancellor. The bill was brought by the assignees of a bankrupt against *Stevens* and several others, charging them with usury ; that they had lent several sums of money to the bankrupt, and had taken ten pounds *per cent.* interest ; the defendant answered every part of the bill, and denied the usury ; and your Lordship decreed an account of what the defendants had received : but it was objected, that if the defendants were bound to answer generally upon taking the account, they might be obliged to answer things which would charge them with usury : and your Lordship was so tender as to direct, that upon their examinations

examinations upon interrogatories that account so directed should not prevent them from insisting that they ought to discover nothing, nor answer any interrogatory which tended to charge them with usury. The case of *Champernoon v. Totnefs* (a), also before the present Chancellor. This bill was brought against the corporation of *Totnefs*, and charged, that the Corporation having been guilty of a trespass and nuisance in stopping the watercourse of the plaintiff's father, that the father had promised to forgive the trespass, and also to let the stoppage continue, upon a promise from the Corporation to vote for him at the ensuing election; and the bill prayed a discovery, whether such a promise was not made, and whether it was performed; the defendants demurred to the bill, as praying a discovery from the defendants of a thing that was contrary to law, and which they ought not to do, and which if discovered would subject them to prosecution; and your Lordship was of that opinion, and held the demurrer good. The case of *Wrottesley v. Bendish* (b), also before the present Chancellor. An estate was given to *Mrs. Bendish* during widowhood; but in case she married, then it was to go over to *A.* who brought his bill against her to discover whether she was not married; she answered part of that question; and upon exceptions to her answer your Lordship ordered, that she should not be obliged to answer this charge, which would subject her, if true, to the forfeiture of her estate. That the present case is much stronger than any of those, because it is praying the discovery of a fact which, if true, would make the defendant a transgressor of those acts of parliament which very nearly concern the public weal, attended with that great penalty of forfeiting his seat in parliament during that session.

MR. SOLICITOR-GENERAL *on the same side* argued, that this Court will not act like an inquisition to oblige parties to make such discoveries as will subject them to penalties: and the question is, Whether the defendant will not subject himself, as a member of parliament, to several penalties and incapacities if he is obliged to answer to the discovery prayed by the plaintiff? It is suggested, that *Mr. Selwyn* procured this office for *Mr. Eckershall*, and that he is no more than a trustee for him. This is a breach, in the first place, of the statute 5. & 6. *Edw.* 6. c. 16. against buying and selling of offices, which has very general words. This is an office concerning the receipt of his majesty's customs or revenue; and it is charged, that the defendant has procured this deputation or office for *Mr. Eckershall*, who is only to have a salary, and *Mr. Selwyn* to have the profits; and it is a selling within this statute if a man procure an office for another, either for a gross sum, or by reserving the profits, or part of them, annually out of the office. Indeed, in the case of *Bellamy v. Burrow* (c) it was decreed, that the office of the clerk of the crown might be granted to one in trust to pay the profits to another.

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(a) 2. Atk. 112.

(c) Cases Temp. Talb. 97.

(b) 3. Peer. Wms. 237.

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HARDWICKE, *Lord Chancellor*. I do not know whether I should have determined that case so far ; I should have had great difficulties about it if it had come before me.

MURRAY, *Solicitor General*. There are two other statutes, in one of which this case falls directly, and is within the other by construction. By the statute 12. & 13. *Will. 3. c. 10. sect. 89, 90.* it is enacted, " That no member of the house of commons shall be " capable of being a commissioner or farmer of the customs, or of " holding in his own name, or in the name of any other person in " trust for him, or for his use or benefit, or of executing by himself " or his deputy, any office, place, or employment, touching the " farming, collecting, or managing of the customs ;" and if he do so, he is declared to be " absolutely incapable of sitting, voting, or " acting, as a member of the house in such parliament." The present is an office relating to the customs, and clearly within this statute. And the defendant swears, that he was a member of the last, and also of the present session of parliament ; so that if he is to discover that this office is in trust for him, he will be rendered incapable of sitting in parliament, and is besides liable to an information or indictment for a breach of this statute ; for wherever a statute prohibits a thing generally, as the present does in the eighty-ninth section, and gives no remedy against the transgression, the law raises by construction the punishment to be by information or indictment ; so that the Court will not oblige him to answer to what would subject him either to a criminal prosecution or to the loss of his seat in parliament, for the latter is to be considered as an incapacity in the nature of a penalty ; and cited the case of *Reade v. Smith*, before LORD HARDWICKE, in chancery. There was a bill brought against *Reade* to discover whether an estate did not come to him by descent from his father, and whether his father did not purchase it, being a papist ; the defendant pleaded, that he was not obliged to discover ; and there your Lordship was of opinion, that he was not obliged to discover whether he claimed from a purchaser who was a papist ; for though the act of parliament do not lay a penalty upon a papist who purchases, yet it prohibits him from taking by purchase ; which prohibition raises an incapacity in the nature of a penalty, as it takes from him that liberty of purchasing which every other subject has. By the 1. *Geo. 1. c. 56.* to incapacitate members of the house of commons from enjoying pensions from the crown, it is enacted, " That if any person shall " have or accept any pension in his own name, or in the name of " any other person in trust for him, he shall be incapable of being " a member of such house or any other ; and if such person shall, " after accepting a pension, presume to vote or sit in such house, " he shall forfeit twenty pounds a-day for so doing, to any person " who will sue for the same." The present is not a pension strictly ; yet it may be a question whether it is not so by construction ; for if the crown give this office to *Mr. Eckershall* under a secret trust to give so much to *Mr. Selwyn*, a member of parliament, yearly out of

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it, this may be within the intention of the statute, for it seems to be equally mischievous whether the money is to be received from the exchequer immediately, or from an officer during pleasure, who receives his office upon that condition, and may be turned out as soon as he refuses to pay such yearly stipend. If so, *Mr. Selwyn* shall not be obliged to discover what will subject him to a pen it of twenty pounds a-day for so long as he shall sit in the house. But there is no occasion to say this is a pension within this statute, because the defendant's equity is strong enough upon the former act of parliament of the 12. & 13. *Will.* 3. c. 10. l. 89, 90.

MR. BROWNE on the other side, that the defendant shall be obliged to discover; for he is not brought into this court by *Mr. Honeywood*, but *Selwyn* is plaintiff in the original cause, and brought *Mr. Honeywood* into this court, in order to be relieved against a legal remedy; and if he ask favours here, he must receive them upon equitable terms, which are, to make an open discovery of the truth of the case; and it is different from those where a man is made a defendant, and brought adversarily into equity, for there the Court will adhere strictly to its rules, and will not oblige a discovery. But to consider this case upon the general rules of the court, which are, that a defendant shall not be compelled to make discovery of such facts as would either subject him to criminal prosecutions or to loss of property by way of forfeiture or penalty. But this case will not fall under those general rules, for by this discovery prayed he will neither subject himself to the loss of property or to a criminal prosecution, but only to a loss of his seat in parliament, which is not a pecuniary loss, nor a place of profit, but of service; and if the defendant is not to answer the discovery prayed, he may elude by his own act his own contract, and screen himself from the penalty of his bond. This agreement to pay eight hundred pounds a-year out of the office was before his sitting in parliament; and his becoming a member is his own act; and if he has resigned his office to another in trust for himself, if he is not obliged to discover whether he has done so, he has defeated his own agreement, and preserved himself from the penalty of his bond; for perhaps this trust may be proved no otherwise than by the defendant's own oath. And to prove that the defendant upon this foundation was bound to make a discovery, he cited the case of *Gaskyn v. Sydwel* (a), before LORD TALBOT: The defendant was the representative of *Sir Robert Nightingale*, an *East-India* director: it seems, that *Sir Robert* had entered into an agreement with several others to carry on an illicit trade to the *East-Indies*; and upon a bill brought by one of the partners against the other for an account, it was pleaded by them, that they were not obliged to make a discovery of the agreement, because it would make them liable to the penalties of several acts of parliament made in order to secure an exclusive trade to the *East-India Company*; but this plea was over-ruled upon two reasons; the one, that it was informally pleaded; the

(a) Rep. in Eq. 186. 2. Eq. Abr. 72. 171.

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other, that when persons entered into such agreements, they virtually waived the penalties of those several statutes; that such plea was in its nature contrary to the agreement itself, and if it were to be allowed, would be a means to elude and destroy the contract of the parties. That all the cases cited are where the discovery would occasion a loss of property: as in the case of usury, the security would be avoided by such discovery, and the money lost: so in the case of marriage, the discovery would have occasioned the estate to have gone from the party; but here the discovery would only occasion the loss, at most, of an honorary office, or a place of trust or service: and the rule has never been carried so far.

The last reason upon which the plaintiff is entitled to a discovery is this: The bill prays a payment of this annuity during all the last session of parliament, and for part of the present: and as the statute of *William the Third* only disables the person from sitting in parliament during that session, the forfeiture suggested is at an end; and so the defendant may at least discover what was the nature of the case during the last session; he may make discovery of that without any danger, the sessions being passed.

HARDWICKE, *Lord Chancellor*. One part of the defendant's answer is, that he is not obliged to make a discovery, because he has performed the bond. This is explained at the Bar to be thus: The bond is for payment of eight hundred pounds yearly during such time as *Colonel Selwyn*, or any person in trust for him, shall be in possession of the office. Now it is insisted, that here being a period of time since the bond in which *Mr. Selwyn* ceased to have an interest in the office during his brother's enjoyment of it to his own use, therefore, according to the construction of the condition, if there was any cessation of *Colonel Selwyn's* having the office the bond was fulfilled and expired, and would not revive, because it was only relative to the continuance of the office without interruption; and therefore, as the bond is performed, he ought not to make a discovery, because it would be a vain thing; and if it was clear that the bond was at an end, there would be no occasion for a discovery; and the Court would not compel a nugatory thing. But here the case is doubtful; and if it stood upon this point, I would oblige a discovery to prevent the plaintiff's loss in case of *Colonel Selwyn's* death; and it might be a nice question upon the foot of collusion, to prevent the parties having advantage of the bond. The other and material part of the defence is, that he is not obliged to make discovery, for fear of subjecting himself to several penalties. The question is not now before me to punish parties for breaches of an act of parliament, or for enforcing an act of parliament which ought to be strictly and sacredly observed; for that is the business of the parliament, or of the Judges, if an indictment will lie upon it. The house of commons is the proper place to enforce a discovery of this sort, and not for this Court from the parties own mouths, any otherwise than such discovery relates to persons who claim rights to or out of such office. And THE QUESTION in the present

present case is, Whether the plaintiff has a right to this discovery? It is an established rule, that no man is obliged, in a court of equity, to discover matters which may subject himself, or tend to subject himself, to any penalty, whether it be loss of property or office, or which may subject himself to any punishment of another sort; for in such cases the defendant may either plead against such discovery, or insist upon it by way of answer. And the consideration is, whether this case is within that rule. Here are two acts of parliament, for I shall lay the Pension Act of the 1. Geo. 1. c. 56. out of the case, within which, it is said, the defendant would be brought under incapacities by those statutes, if he was to make the discovery prayed for. The first statute is the 5. & 6. Edw. 6. c. 16. relating to the sale of offices. And it is insisted upon, that it is contrary to that act of parliament for any person to accept of an office, or to have an office upon terms of paying either a certain sum of money or the profits of that office to another, because such contract is in the nature of a consideration given for the having or obtaining such office. But whatever the law might be upon this point, I think *Mr. Selwyn*, the defendant, cannot enter into that consideration, though that should be the construction, for *Mr. Selwyn* is not the officer, but *Mr. Eckershall*. If a bill was brought against *Mr. Eckershall* to discover whether he held that office in trust or by contract to pay over the profits or part of them, or a gross yearly sum, he might well insist upon it that that would be to make a discovery tending to the forfeiture of his office. But *Mr. Selwyn* cannot insist upon that act of parliament; for the only statute he can insist upon is, the 12. & 13. Will. 3. c. 10. s. 89, 90. in which it is enacted, "That no member of the house of commons shall be capable of holding, in his own name, or in the name of any other person in trust for him, or for his use or benefit, or of executing by himself or deputy, any office in the customs; and if he does so, he is declared to be incapable of sitting as a member in that parliament." It is insisted, that this discovery would subject the defendant to this penalty of the loss of his seat in parliament for that session. The plaintiffs agree to the general rule, that a defendant shall not discover what shall directly charge himself with a penalty, or with evidence of it. But they argue, that the defendant is not within the rule for three reasons: FIRST, That though the rule be true upon common cases of bills, yet this differs from it, the discovery being prayed upon a cross-bill, &c. SECONDLY, That the exclusion from a seat of parliament, being only a place of honour or service and not of profit, is not such a loss of property, or such a penalty, as will screen the defendant from a discovery. THE THIRD reason is, that he may discover what relates to the session which is past without any danger; for the exclusion from sitting in parliament being only during that parliament, the forfeiture is expired with the session. AS TO THE FIRST REASON, that does not differ the case at all, whether the discovery is prayed by original bill or cross-bill; and I will clear this by a familiar instance: Suppose an original bill is brought for a specific performance of articles between

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two parties, and then the defendant brings a cross-bill to be relieved against the said agreement, and for a discovery should charge matters to shew that the agreement was corrupt, and against the statute of Usury, the defendant in the cross-bill might insist by his answer, that he was not obliged to answer such bill. This brings me to the merits of the question, and to THE SECOND REASON given, that this is not such a discovery as will subject the defendant to what is properly a punishment or penalty; and they define those to be a loss of estate or property, or some office that is beneficial and profitable, or some corporal punishment; that the loss of a seat in parliament is not punishment, nor such a loss of property as is within the rule, for a seat in parliament is not an office of profit, though they admit it to be an office of service, and of high trust and honour. But I am of opinion, that an incapacity of sitting in parliament is a punishment within that rule, for it is often inflicted as a punishment; and there are acts of parliament which inflict absolute exclusions from parliament as punishments; which shews they are to be considered as such, and inflicted as a punishment upon the violators of this very statute 12. & 13. Will. 3. c. 10. I remember a case wherein the point was contested, that a seat in parliament was a service, and not a privilege. The case I mean is that of *Abby v. White (a)*, where the question was, Whether an action would lie against the returning-officer for the refusing to take the vote of a person qualified? and MR. HARLEY, the Speaker of the house of commons, opposed the lying of an action at law, because the sitting in parliament was a service; and to be sure it is so, it being to serve the crown in the great meeting of the nation; but it is also a service attended with privileges, as many services are. *The Duke of Buckingham*, who was beheaded in *Henry the Sixth's* time for high treason, held six manors in *Gloucestershire*, by grand serjeanty, to execute the office of high-constable of *England*: this office is, as to the crown, a service, but in all other respects attended with privileges, and of great dignity, and such an office as the invasion of it might be punished by an action, and damages recovered. As to THE THIRD REASON to induce a discovery for at least part of the time for which the annuity is granted, it is said, that there have been two parliaments held in the period of time for which the annuity is payable. The grant of this office to *Mr. Eckershall* was in 1734, during the last parliament, which did not expire till 1741; that the penalty inflicted by the 12. & 13. Will. 3. c. 10. is from sitting in that parliament, and therefore the defendant may without danger discover what was the nature of the grant of this office during the last parliament, which is expired; and if the defendant had not also set forth, that he is a member of the present parliament as well as of the last, I should have thought him obliged to have made a discovery. But suppose I should compel the defendant to make a discovery for the last parliament, and protect him from making any for the present, he will be obliged to set forth,

(a) 1 Salk. 19. 3. Salk. 17. 6. Mod. 1. Brown's Cases in Parliament, 45. Ray. 45. 8. State Trials, 89. Holt, 524. Ent. 479.

whether *Mr. Eckershall*, at the time of taking the office, did not take it in trust for the defendant, and whether he did not account for the profits to the defendant during the last parliament. That evidence would be sufficient to prove, that the office is held in trust for him even during the present parliament, whereby he would lose his seat in the present parliament, and would plainly incur the penalty of the statute of *William the Third* by his own confession, which this Court will not oblige him to do; for such confession might be read against him in the house of commons, who would doubtless, upon that, exclude him from their house during this sessions. And I should also have the same thing insisted on at the hearing of this cause, that such office was held in trust for him even during this sessions of parliament; and I should take it to be sufficient evidence; for if a man admit that an office was granted in trust for him, and that it continued so for seven years, it will be very strong proof that it is still held in trust for him. As to what has been said, that an indictment will lie against *Mr. Selwyn* for a breach of this statute, if it should come out that this office is held in trust for him, of this I am very doubtful; for the statute is not, that no such office shall be so granted: and though an indictment or information might lie against a member of parliament for accepting such office in the customs, and exercising it, yet as *Mr. Selwyn* is only a *cestuy que trust* of the office, I do not see what indictment or information can be framed upon it. Upon the whole I AM OF OPINION, that upon the foot of the statute 12. & 13. Will. 3. c. 10. the defendant is not obliged to discover the fact prayed, nor evidence of the fact. The plaintiff may make proof by other persons of the fact, but is not entitled to the defendant's confession. Therefore such exception to THE MASTER's report must be allowed.

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Wilkinson against Sterne.

Case 143.

IN THIS CASE the defendant was indebted to the plaintiff's testator by mortgage and bond; and a dispute arising about the payment of one hundred pounds by the defendant to the testator, whether it should be applied to the discharge of one of the bonds, or only to pay the interest due upon the mortgage, the plaintiffs, before the Master, produced a pocket-book of the testator, in which he had entered a memorandum, about a fortnight after the receipt of the money, that it was in part of the interest due upon the mortgage. The Master admitted the book to be evidence of the application of the money. Whereupon the defendant excepted to the report, and insisted, that the book ought not to be received as evidence, especially as the entry was not made at the time of the payment of the one hundred pounds: but at the same time he produced no evidence, besides his own oath, that he paid the one hundred pounds in discharge of one of the bonds; and his Counsel cited the maxim, *Quicquid solvitur, solvitur secundum modum solventis*; and

If a person indebted by mortgage and bond pay money to his creditor generally, the creditor may apply it in discharge either of the mortgage or bond.

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and the case of *Manning v. Westerne* (a), was cited on the other side.

HARDWICKE, *Lord Chancellor*. The distinction is this: Where a man is indebted by mortgage and bond, and pays money to his creditor, he must make the application, and declare to which debt he applies the money, at the very time he pays it, and he cannot make the application afterwards; but his creditor may make the application any time after a general payment by his debtor, so as he does it before an account settled between them: and there have been abundance of cases upon this distinction. And I am clear, that the pocket-book of the plaintiff's testator is to be admitted as proper evidence; and there cannot be better evidence to that end; for it is not to prove the truth of the payment, for that is admitted on both sides, but only to prove the application of the money; and as the testator, if he had been living, might apply it to which security he pleased, even now, so undoubtedly his handwriting shall prove; and as this entry was made thirteen or fourteen years before this suit, it cannot be supposed to be dressed up to serve any particular purpose.

(a) 2. Vern. 606.

Case 144.

Wingfield against Newton.

Legacy, when
lapsed or pay-
able.

FERDINANDO WINGFIELD, by his will, dated the thirty-first of *March* 1731, made *Joseph Wingfield* his executor, and gave to *Robert Newton* a legacy of one thousand pounds, to be put out at interest until he should attain his age of twenty-one; and in case of his decease before the time, then the one thousand pounds to go to *Margaret* his daughter; but if *Robert* lived to attain the age of twenty-one, then five hundred pounds, part of the one thousand pounds, to go to *Margaret*, and to be paid her when *Robert* should arrive at that age. *Margaret* died before that time.

THE QUESTION upon this part of the devise was, Whether, *Margaret* dying in the life-time of *Robert*, and before he attained his age of twenty-one, though he attained it afterwards, this should be said to be a lapsed legacy, or transmissible to the administrators of *Margaret*.

HARDWICKE, *Lord Chancellor*. I am of opinion, that this is not a lapsed legacy, but transmissible to her administrators. Indeed the general rule by the civil law is, that where a legacy is given after a time to come which is uncertain, there by the death of the legatee before the time of payment the legacy is lapsed; as in *Swinb.* 30. 393. &c. It is there also said not to be material whether, in such bequest, the uncertainty be joined to the substance of the legacy or to the execution of it; but that in either case the legacy is extinct. But that doctrine has been long ago over-ruled in this court by LORD NOTTINGHAM, in 2. *Ventr.* 347. *Anonymous*: A devise of one hundred pounds was to *J. S.* at the age of twenty-one years; and

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and if *J. S.* died under that age, then to *A.* and *B.* or the survivor. *A.* and *B.* both died in the life-time of *J. S.* and then *J. S.* died under twenty-one years; and it was decreed, that the administrator of *B.* who outlived *A.* should have the one hundred pounds, notwithstanding the legatee died before the contingency happened. So in *Pinbury v. Elkin (a)*, Devise of all his estate to his wife, but in case she died without issue by the testator, then eighty pounds to *J. D.*; *J. D.* dies in the life-time of the wife, and then the wife dies without issue: the legacy decreed to the administrators of *J. D.* And the like point in the case of *King v. Withers (b)*, and in *Corbett v. —*. From all which cases it appears, and is also my opinion, that a contingent interest is transmissible to executors or administrators in equity as much as a bare possibility is at law, though it be not assignable. The only distinction is, whether the contingency depends upon such an event: as if a legacy be given to *B.* upon the marriage of *J. S.* and *J. S.* dies without marrying, here his death before marriage has put an end to the legacy, because it is now impossible that the contingency of the marriage should ever take place; but so long as *J. S.* be alive, the event of his marriage, upon which the legacy depends, may happen, and so the contingent interest in the legacy will remain unextinct, whether the legatee live or not. So in the principal case, the contingency of *Robert's* attaining to the age of twenty-one having happened, the legacy must charge the assets of the testator, and it is not material whether *Margaret* died before or after *Robert's* attaining his age of twenty-one.

ANOTHER QUESTION in this cause is as to a sum of one thousand three hundred pounds paid out of the testator's *South-Sea* annuities after the making his will and before his death, by way of annihilation, under the statute of 4. Geo. 2. c. 5. it not appearing what is become of it; Whether this is to be considered as an ademption *pro tanto* out of the several legacies charged thereupon? or, Whether this ought to be made good to the legatees out of the assets in the hands of the executor?

Construction of
a will as to what
shall be considered
an ademption
of legacies.

As to this question the case was thus: The testator had a great quantity of *South-Sea*, *Bank*, and *India* stock, and devised as follows: "Item, I give and devise to my daughter *Margaret Newton*, her heirs and assigns, my rent-charge of twenty-five pounds a-year, and all my money, goods, chattels, notes, bonds, securities, and personal estate, except all such money or securities for money as I have in *Bank* stock, *India* stock, *South-Sea* stock, and *South-Sea* annuities, which I charge with the payment of my debts, legacies, and funeral; and the surplus I give to trustees for my daughters." Afterwards, on the twenty-sixth of January 1731, by a codicil, reciting, that he had changed his mind in some things, and confirmed it as to the rest, he gives to his daughter *Margaret* the fifth part of the surplus of the *South-Sea* and other stocks and

(a) 2. Vern. 768. Prec. in Chan. 483. (b) Cases T. T. 117.

annuities,

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annuities, to be at her own disposal, and upon her death then to the surviving daughters. Between the making of the will and this codicil the thirteen hundred pounds was paid off. As to this part of the case, I AM OF OPINION, that this is not to be considered as an ademption of any part of the legacies, but that the deficiency ought to be made good to the legatees out of the assets of the testator. It has been insisted for the plaintiff, that the *South-Sea* stock charged with the payment of the testator's legacies was a specific legacy of stock *statu quo tempore doni*, and as such would not admit of any satisfaction in value, but must be extinguished as to so much which has been paid off. But I deny it to be a specific legacy; and if not such a legacy, the act of parliament is no ademption of it. It is plainly a general bequest of *South-Sea* stock, whether more or less, which the testator had at the time of his death; for though to some purposes a will must be taken to speak from the time of its making, yet that rule holds only as to particular things or individuals, and not as to all personal legacies in general; but construction must be made upon the whole will; and the testator's intent is to be considered, whether it was to extend the description of the thing devised to the time of his death, or to confine it to the time of executing his will. In the present case it appears, that this is not a substantive independent legacy of *South-Sea* stock, but it is a legacy given by way of exception out of the general precedent legacy of the whole personal estate; and there is no doubt but this general legacy of his personal estate relates to such personal estate as he had at the time of his death; and whatever money, goods, &c. he acquired after the making his will certainly pass by such will. Then the legacy which follows by way of exception must be construed in the same manner; for as it is a maxim, that *Exceptio probat regulam in casibus non exceptis*, so it is no less true, that the rule serves likewise to explain the exception; and in whatever manner the rule itself is to be taken, in the same manner shall the exception derived out of the rule be taken. To apply that to the present case: As the general bequest related to all the personal estate which the testator should have at the time of his decease, so likewise must the legacy, which is by way of exception out of the general charge, relate to the testator's whole personal estate which he had at the time of his decease, and cannot be confined to the specific *South-Sea* stock subsisting at the time of making the will. Much stress has been laid on the manner of wording this devise; and it is observable, that the testator devises *all such money*, not as he *shall have*, but as he has, in the *South-Sea*, &c. stocks. And therefore this being a description in the present tense cannot be construed to relate to any other personal estate than that particular sort which he had at the time of his will. But I think this too strict a construction of a will, and not warranted by the plain sense and meaning appearing upon the face of it. The distinction in general of words and tenses is not so exactly observed in *English* as in other languages, especially *Latin*. So in particular the present tense amongst us is very uncertain in its signification. It is often used with us to denote a kind
of

of future present tense, or something relative to the present which shall hereafter exist : and in this sense I take it the testator has used it upon this occasion, as he does likewise in another part of his will, where he gives a charity to the poor of the parish of *A.* *having no such relief* as there is mentioned ; which word "having" must plainly relate to the time when his intended charity was to take effect, that is, at the time of his death ; nor can it admit of any other construction. It is plain, that if the testator, instead of selling out, had purchased any more stocks after the making of his will, those would have passed by the description in the will ; and there is the same reason here why the bequest should relate here to such *South-Sea* stock as he had at the time of his death. But there is another matter which still further clears this point, and that is the codicil, which was made after the thirteen hundred pounds was paid off, and confirms the will in every particular not expressly altered thereby ; so that by this the testator's intent is manifest beyond all doubt. As to the cases cited, of ademption of legacies, out of *Equity Cases Abridged*, 301, 302. they are not applicable to the case in question : for as to the case of *Ford v. Fleming*, which was 21 July 1728, before LORD KING (a), that was a bequest of a particular specific sum ; for if it had been a general bequest, it would have been otherwise. The case of *Harding v. Smith*, before SIR JOSEPH JEKYLL, 8th November 1726, was likewise a specific bequest, for it was of all monies due upon a mortgage of a certain farm named in the will : and the rule is general and well known, *Quod id certum est quod certum reddi potest*. The case of *Purse v. Snaplin* (b), which was also before SIR JOSEPH JEKYLL, and reversed by myself, was a legacy of a specific sum of five thousand pounds specified in the will by the name of *stocks* ; but that case turned upon this consideration, that stocks were legacies in words of quantity only. So *Partridge v. Partridge* (c) was a particular quantity ; and *Brunsdon v. Winter* (d) was a devise of specific stocks and navy bills.

(a) 1. Eq. Abr. 302. 2. Stra. 323. (c) 2. Eq. Abr. 570. 572. in notis.
2. Peer. Wms. 469. Cases Temp. Talb. 226.
(b) 1. Atk. 414. (d)

James Pipon, Philip Pipon, William Davies, and Others, *against* Elizabeth Pipon, Jane Pipon, John Hardy, and Others. Case 145.

In Chancery, June 6, 1744. Trinity Term, 17. & 18. Geo. 2,

JOHN PIPON, a native and inhabitant of the island of *Jersey*, died intestate, on the eighteenth of July 1740, leaving no children, nor any father or mother, nor any brother ; all the plaintiffs, except *Davies*, were the nephews and nieces of the said *John Pipon* ; and the two defendants, *Elizabeth* and *Jane*, were his sisters. The intestate, at the time of his death, had a considerable personal estate in *Jersey*, but had no effects in this kingdom, except

The laws and customs of the island of *Jersey* considered with respect to the distribution of an intestate's effects.

one

JAMES PIPON, one debt of six hundred and fifteen pounds ten shillings and one
 PHILIP PIPON, halfpenny, due by simple contract by *Henry Durell*, of *London*.
 WILLIAM
 DAVIES, Soon after the intestate's death, the plaintiffs, nephews and nieces,
 AND OTHERS, impowered the plaintiff *Davies* to take out of the prerogative court
 against of *Canterbury* administration to the intestate for their benefit,
 ELIZABETH which was accordingly done; and soon after the said *Davies*
 PIPON, received the said debt of *Durell* in this manner, viz. fifty-one
 JANE PIPON, pounds ten shillings and one halfpenny in specie, and the residue by
 JOHN HARDY, the transfer of stock. Soon after this, the defendants, the sisters,
 AND OTHERS, having notice of the said debt due from *Durell*, and of the admini-
 stration granted to *Davies*, the defendant *Hardy*, by their order,
 obtained a repeal of the said letters of administration, and procured a
 new administration to be granted to himself as their attorney.
Davies, a little before the repeal of the administration granted to
 him, sold the stock. The present bill was brought by the nephews
 and nieces to have a distribution of the intestate's effects in this
 kingdom, and particularly of the said debt of six hundred and fifteen
 pounds ten shillings and one halfpenny. The defendants in their
 answer insist, that by the laws of *Jersey*, wherever an intestate
 leaves sisters and no brothers, but brothers children, his personal
 estate is to be divided among the sisters, in exclusion of the children
 of the deceased's brothers or sisters; and therefore that this debt
 must be divided between the defendants, *Elizabeth* and *Jane*, the
 intestate's sisters.

This cause was heard by consent upon the bill and answer, and
 was argued by MR. CHUTE and MR. NOEL for the plaintiffs to
 this effect: The defendants do not put their case upon the sta-
 tutes of Distributions, but on the customs of *Jersey*, by which
 they insist, that the plaintiffs are incapable of taking any part of
 the intestate's estate. And the question in this cause will be,
 Whether those customs shall affect the property of effects in this
 kingdom? The distribution between debts due by specialty and
 those due on simple contract is well known to be this; that the for-
 mer are *bona notabilia* in the diocese where they are, but the latter
 follow the person of the debtor, and are *bona notabilia* where he
 dwells. They could not, therefore, have recovered this debt
 without taking out administration here; and upon taking out
 administration, they must have given a bond to the ordinary to
 make distribution according to the statute; and consequently this
 debt must be distributable according to the statute. But the
 defendants seem to insist upon a proviso or saving in the act of the
 customs of *London* and the province of *York*, and of other places
 having known and received customs peculiar to them. But this
 proviso cannot be taken to extend to any places out of the king-
 dom, and therefore can be of no service to the defendants. In the
 province of *York*, that third part which neither the wife nor children
 can claim by the custom is distributable according to the statute.
 2. *Vern.* 82. it is held, that the customs of the province of *York*
 are local; and it is the locality of the effects that gives the special
 court jurisdiction to grant administration; as the debt was here,
 they were obliged to take out administration in *England*, and the
 ordinary

ordinary upon granting it is required to take bond from the administrator to make distribution according to the statute; and it is very difficult to account for this method of proceeding, unless the effects are to be distributed according to our laws; and a contrary construction would entirely rescind all the provision and security required by the act of parliament.

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WILLIAM
DAVIES,
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against
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JANE PIPON,
JOHN HARDY,
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ANOTHER COUNSEL for the plaintiffs said, that the Court cannot take notice of the laws of *Jersey*, and that the effects being in *England* must be subject to the statute, *Jersey* not being within the proviso or saving of the act.

MR. ATTORNEY-GENERAL for the defendants. The laws of *Jersey* are separate, distinct, and independent, of the laws of *England*, though not of the Legislature of *England*. It is insisted on by the defendants answer, that by those laws the surviving sisters of an intestate are entitled to his personal estate, in exclusion of the children of his deceased brothers and sisters, and therefore that the plaintiffs are not entitled to any part of the intestate's estate. The plaintiffs have not replied to the answer, and therefore it must be taken to be true. It has been contended for the defendants, that the personal estate is merely local, and that the right the next of kin to an intestate have to it depends upon the locality of it, or upon the place where it is found at the time of his death. I shall insist upon the reverse of this proposition. They have not shewn any one instance in which the Court has considered it in the light they contend for; but all their instances, and the nature of the case, prove the contrary. The nature of personal estate is, that it attaches on the person; and the nature of the real estate is, that it is attached to the place, because it is a fixed thing. The very meaning of personal estate is that thing which belongs to the person. Suppose a person is an inhabitant, and dies, in the province of *York*, and has *bona notabilia* in that province, and also in the province of *Canterbury*; there must be an administration taken out in both provinces, and yet the person who took out administration in the province of *Canterbury* must make distribution according to the custom in that province.

HARDWICKE, Lord Chancellor. That is a case directly within the proviso.

MR. ATTORNEY-GENERAL. It is so; but the mere locality of the personal estate does not create any right in respect to the distribution. The locality of the personal estate determines nothing but the jurisdiction that is to grant the administration; but the distribution depends upon the quality of the person, either as a freeman of *London* (which follows the person wheresoever he goes), or as an inhabitant of this or that particular province.

HARDWICKE, Lord Chancellor. Hardy the administrator and all the persons intitled to the distribution live in *Jersey*. The administration to Davies being repealed, he is now become a debtor to Hardy; and the case is in the same situation as it would have been

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been if the debt had continued in the hands of the original debtor. How can I decree an account to be taken here of the whole personal estate? and without that, how can it be known what will remain in the hands of the administrator after payment of the intestate's debts? It would affect the commerce of this kingdom to a very great degree. Merchants abroad have debts here; and if those should be distributed according to the laws of *England*, it would be a most mischievous thing to the commerce of this country; and no distinction was ever made between the effects a man has here and those he has abroad. In the case of *Van Theman*, before my LORD KING (a), *Colone Van Theman* brought his bill for a distribution of the effects of his late wife, which she was intitled to by a legacy from the first husband; and an account was decreed. I was Counsel for the plaintiff, but not satisfied with the decree. However, it was made by default, the principal defendant not having answered, but *Mr. Jacobson*, the trustee, was the only one who put in any answer; and that point, how far the law of *England* attaches on goods here, was mentioned, but not determined, the decree being made by default. I had a great doubt about it in respect to the inconveniencies it would bring upon trade. Besides, that was a question about stock, which is a specific part of the personal estate, and may differ from the case of a mere debt, which follows the person of the debtor wherever he is.

MR. ATTORNEY-GENERAL. Can it be supposed that the right of distribution should depend upon the removal of the debtor? The administration is nothing but an authority to get in the effects of the intestate. In the case of *Burrows v. Jamineau* 1726, in chancery (b), a person drew a bill here, on a person at *Leghorn*, who accepted it there; and the drawer was a bankrupt in *London*, but the acceptor had notice of it: the acceptor was sued at *Leghorn*, and sentence was given for him, because, by the laws used there, if a person accept a bill of exchange, and had no effects of the drawer in his hands at the time the bill was drawn, or had no notice of the bankruptcy, the acceptor is not liable. It happened, that the acceptor came here, and was sued at law. Upon which he brought his bill in this court for relief and an injunction; and he was relieved; and the Court said, that the acceptance at *Leghorn* bound the acceptor according to that place.

HARDWICKE, *Lord Chancellor*. The strongest objection in that case was, that if it was right it was only a conditional acceptance, and that advantage of it might be taken at law.

MR. ATTORNEY-GENERAL concluded his argument with citing at large the case of *Jeanbert v. Twiss*, *Preced. in Chan.* 207. to shew, that the Court will take notice of the laws of foreign nations.

MR. SOLICITOR-GENERAL *on the same side for the defendants*. The Court may dismiss the plaintiffs bill without going into the

(a) 2. Eq. Abr. 425. Fitzg. 203.

(b) 1. Stra. 733. 2. Eq. Abr. 524.
 merits

merits of the case ; for the only way by which the present question is brought before the Court is by the administration which the plaintiffs fraudulently obtained to be granted to their attorney, which has been since repealed by the ecclesiastical court. *Davies* having by false suggestions taken out letters of administration receives the debt of *Durell*, and joins in this bill to prevent the true administrator from getting it out of his hands ; and in this manner the cause is brought before the Court. If this had not been done, *Durell* might have paid the debt to the administrator in *Jersey*, and he would have made distribution according to the laws there : if that had been done, this Court would not have called that matter in question, and therefore it is owing to their fraudulently getting the money into their hands that the present question is brought before the Court. This misbehaviour of theirs is not to be encouraged ; and on that foundation the bill may be dismissed without entering into the general question.

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PIPON,
JANE PIPON,
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HARDWICKE, Lord Chancellor. I would not, if I could avoid it with justice to the parties, enter into the general question. It is admitted, that *Davies* under the first administration, which is now repealed, received this debt due from *Durell*. By that, he is a debtor merely to the estate of the intestate, and he has nothing to do to come here, but ought to pay it over to the rightful administrator. The difficulty is, where the other complainants, the nephews and nieces, have not a right to come here, not to call *Davies*, but to call *Hardy*, to an account for this particular part of the estate abstracted from the rest of it.

MR. CHUTE for the plaintiffs. *Mr. Hardy* is now, and hath been all along, in *England* ; he took out administration, and has answered under the process of this court : the effects are here ; and therefore the plaintiffs have a right to have this matter examined into in this court. With respect to the general question, I know no case that will influence it, but hope it is properly brought before the Court.

HARDWICKE, Lord Chancellor. I AM OF OPINION, that there is not a sufficient ground for me to decree an account for the plaintiffs. I am very unwilling to determine the general question in this case, which may admit great variety of constructions, and some difficulty too ; therefore I chuse to determine the case without entering into it. If I was to enter into the general question, I should think, that a man's personal estate is supposed to follow his person wherever he is, and is distributable according to the laws of that country where his person is ; and as to the different jurisdictions relating to this personal estate in respect to the probate of wills or administrations, they arise from the nature of the remedy that is to be made use of for the recovery of that estate ; and therefore to enable a person to sue for any part of the personal estate, he must qualify himself from that which is the proper jurisdiction of the place where the personal estate lies, but does not determine the right of the equitable property, or to that property which is considered in equity, or in the

JAMES PIPON, canon or ecclesiastical law, in distributing the shares of that personal
 PHILIP PIPON, estate; and therefore the cases that have been put are right, and
 WILLIAM prove this: If a man be an inhabitant of the province of *York*, and
 DAVIES, die there, having goods both in that province and also in the pro-
 AND OTHERS, vince of *Canterbury*, it is incumbent on his administrator to take
 against out administration in both provinces, and yet, notwithstanding, the
 ELIZABETH whole personal estate will be distributable according to the custom
 PIPON, of the province of *York*; which shews it is not the jurisdiction out
 JANE PIPON, of which the administration must be taken which is necessary to
 JOHN HARDY, give the party a right to sue that will govern the right and interest
 AND OTHERS, in distributory parts of that estate. Then consider the present case.
 It is rightly said, that *Jersey* must be as much considered a foreign
 country in respect to the laws of *England* as if it were not parcel of
 the crown of *England*, for it is no part of the kingdom of *Great
 Britain*, but is a distinct dominion, which the king of *Great Britain*
 is intitled to in right of his duchy of *Normandy*, and consequently
 governed by the laws of *Normandy*. Then the case is thus: A
 man is an inhabitant and dies in a foreign country; the bulk of his
 personal estate is there; he happens to have a debt owing to him in
England, which cannot be recovered without taking out admini-
 stration in *England*; the question is, Whether that shall be con-
 sidered as part of the bulk of his personal estate to be accounted for
 according to the laws of the place where he is resident? or, Whe-
 ther any persons not resident in *England*, but inhabitants of a
 foreign country, who by the laws of that foreign country have no
 right to any, but would have a right by the laws of *England*, can
 come into this court, and by reason of the taking out of admini-
 stration here can compel that administrator to account to them for
 this part of the personal estate abstracted from the residue of that
 estate? If that were the mere question before me, I should incline
 to think (but I do not mean to give any opinion to bind me), that it
 could not be done, and would be extremely mischievous, and
 greatly affect the commerce of these kingdoms. No foreign
 merchant would know how to deal here, but at the peril of having
 all his debts here separated from the rest of his personal estate, and
 distributed according to the laws of this kingdom. The bond re-
 quired by the act is, that the administrator shall account before the
 judge of the ecclesiastical court, and pay the residue of the intestate's
 goods, chattels, and credits, to such persons as the said judge or
 judges shall appoint pursuant to the statute. What is it that is to
 be distributed? It is the rest and residue of the personal estate after
 payment of debts and other just allowances. Nobody can come
 here for an account of part of the estate, but must pray an account
 of the whole estate. How can this residue be made appear but by
 accounting for the whole estate, and not by an account of a parti-
 cular debt only; and therefore on the words of the statute I should
 think there could be no such decree as is now prayed: and do but
 consider what work it would make. The general administrator is
 not before the Court; how can I decree an account of the whole
 estate? and without it I cannot find out the residue: and if the
 general

general administrator were before the Court, I might decree an account; but the consequence of it would be, that if the administrator accounts here, and has such allowances, and makes such distributions as are agreeable to the laws of *England*, the courts of *Jersey* might decree him to account with different allowances and different distributions. But the only matter now to be determined is, whether the present bill is properly brought? as the first administration is repealed, and a new one granted; and as to *Davies* being a plaintiff, the bill is improper, for he is now only a debtor to the estate, and consequently a debtor to the second administrator. What has he to do to come here to pray an account to be taken? He is a debtor to the estate, and liable to an action at law by the administrator, who may, the next day he recovers it, carry it into *Jersey*, and account for it there: and that would be the right way, and is the common case of all persons who are subjects of foreign princes and have debts here. *Davies* is therefore to be laid out of the case; and in respect to the other plaintiffs, they have nothing to do to come here for an account of this particular part of the personal estate. They have a right to call the general administrator to an account; but no person entitled to a share of the residue of the estate can come into this court for a particular part of that estate detached from the rest. The general administrator is not before the Court, and therefore I cannot decree an account. The bill must be dismissed with forty shillings costs only, as the cause was heard by consent on bill and answer.

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WILLIAM
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AND OTHERS,
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JANE PIPON,
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Jobson against Pelly.

Case 146.

In Chancery, Trinity Term, 1744.

WILLIAM JOBSON, in the year 1719, gave a marriage bond of one thousand pounds to trustees to the use of his intended wife. He afterwards married her, and died, and by his will gave her an annuity of forty pounds *per annum*, clear of all deductions, out of the produce of his estate.

An annuity of 40l. a-year devised to a wife is no satisfaction of 1000l. settled on her previous to the marriage.

The question was, Whether this annuity be in satisfaction of the bond?

After reading the evidence, and hearing a few arguments from THE ATTORNEY-GENERAL, THE LORD CHANCELLOR said, he never knew a more frivolous defence or a plainer case; that even if the annuity had amounted in value to the purchase-money of one thousand pounds it had not been sufficient, because of the particular penning; though he said, in some cases that might have made the matter more disputable: but in this he had no doubt in directing, that the testator's estate should be liable both to the marriage bond and the annuity; for it could not be intended as satisfaction.

Case 147.

Meadbury against Isdall and Freind.

Trinity Term, 1744.

In what cases
the court of
chancery will
admit the de-
fendant's testi-
mony.

HARDWICKE, *Lord Chancellor*. The rules of this court differ from the rules of law with respect to the admission of a defendant's testimony. If a plaintiff at law make several defendants, he cannot examine one of them as a witness in a case of the crown. This was determined in the king's bench by the whole Court, where the *Attorney-General*, TREVOR, had concluded his evidence without proving anything against one of the defendants; and upon offering to make him a witness, an objection was made to his competency; and after long debate he was refused *PER TOTAM CURIAM*. He afterwards entered a *no! profi.* and then he was admitted. In this court the rule is different; the plaintiff is intitled to the evidence of any of the defendants; but then there must be always a suggestion in the order, that such defendant is not interested in the event of the cause. How stands the present case? Here is a charge in the bill against the several defendants, one of whom the plaintiff would make use of by way of witness against the other; the defendants, both of them, have put in their answer, and the plaintiff makes no reply to one, but leaves the charges standing to the bill. If his case comes out to be true, he is intitled to a decree against them both, and a contribution; so that they are both interested in the event, and the plaintiff cannot be entitled to either of the evidence. He ought to have moved to amend his bill, and struck out the charge against the defendant *Mr. Freind*, and then he might have been admitted; but as it is he cannot.

Case 148.

Skip against Edwards.

In Chancery, Trinity Term, 1744.

H. A. take a joint
bond from *B. C.*
and *D.* and af-
terwards accept
the notes of *B.*
and *C.* in dis-
charge of the
bond, chancery
will not afford
A. relief against
D. on the notes
not being paid,
D. being a mere
surety, and not
having received
any part of the
consideration-
money.

IN 1739, the plaintiff advanced the sum of two thousand pounds to two joint traders, *Hervey* and *Wilcox*, upon their bond, in which the defendant, *Mr. Edwards*, was a surety. At the expiration of a year, *Mr. Edwards* growing uneasy insisted upon the bond's being paid off, that he might be clear; and accordingly the two co-obligors had afterwards a meeting with the plaintiff in order to discharge the same. By way of payment, they drew two notes upon different people payable at a future day, and also gave him a goldsmith's note, which (it being on a *Saturday* night) was made payable the *Monday* following. The plaintiff, *Mr. Skip*, delivered up his bond, with a receipt indorsed in these words: "Received in notes and cash the full contents of this bond." He at the same time took a note from *Hervey* and *Wilcox* in these terms: "The above notes being payment of ours and *Edwards's* two thousand pounds bond, if any of the said notes should
" not

"not be paid, they shall be made good by us, *Hervey, Wilcox*;" and *Mr. Edwards's* name, who was not privy to this transaction, was likewise signed by *Hervey*. It appeared, that the person upon whom one of the notes was drawn, proved insolvent by becoming a bankrupt before the day of payment. The goldsmith's note was also refused, and the plaintiff, *Mr. Skip*, received for answer, that they had none of the drawer's money in their hands, it having been all taken out by *Hervey* the *Saturday* before. *Hervey* himself became a bankrupt, and a commission was awarded against him the *Monday* next after this matter was transacted. Upon this the plaintiff brought his bill against *Edwards*, the surety in the original bond, praying that he might be liable to pay the residue of the two thousand pounds due thereon, it having been fraudulently procured from the plaintiff upon false pretences.

SKIP
against
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And it was argued by *MR. CHUTE* and *MR. CLARKE* for the plaintiff, that the notes were only conditional payment; and though the bond was delivered up, the debt was retained. *Salk. 127. Clerk v. Mander*, Notes payable at a future day shall not be looked upon as a discharge of a precedent debt or contract. They are all three principals in the original bond, and nothing has ever moved from *Mr. Edwards* that can discharge him. If it had, it would have altered the question, and made the contract more doubtful, whether it should interfere in behalf of the plaintiff to make the defendant pay the debt twice over. If the question had been, Whether the obligee, or *Mr. Edwards*, should suffer by *Hervey's* sinking the money? in that case the scale would perhaps turn against the plaintiff. But here the question is, Whether one man shall be injured and another advantaged by fraud? and not, Whether one or other shall be sufferers? Does the nature of this transaction import that such notes shall be received in absolute discharge of a bond? Would anybody in their senses accept of single notes in discharge of a bond with three obligors? There are several cases where acceptance of notes payable at a future day, if no laches in the party, are no discharge. *Salk. 442. Ward v. Evans*. It is to be considered, Whether *Mr. Edwards* has not made himself party to the note given by *Hervey* and *Wilcox*, *ut supra*; for he has done nothing himself in discharge of the bond, but is taking advantage of the transaction between them and the plaintiff; and if he should not be bound by their note, it would be making use of an act which they have done in his name in one respect, and not being bound by it in another. We come before the Court in a very favourable light, it being to be relieved against a fraud; and all we pray is, to be reinstated into the same situation that we were before the fraud committed.

Hankey v. Jupp
man, B. R.
Mich. 1748.

MR. ATTORNEY GENERAL and *MR. SOLICITOR-GENERAL* for the defendant. It is agreed, that the plaintiff has no claim at law, because the bond is cancelled and delivered up. The question is, Whether he be intitled to relief in equity? It must be granted, that there are some cases where a bond may be cancelled so as to

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1. Vern. 196.
Ratliffe v.
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defeat a claim at law, and yet the plaintiffs may be relieved in equity; and they on the other hand must allow likewise, that in many instances the extinguishment of the title at law is so likewise in this court. The question is, Which of these alternatives the present case falls under? In cases of mere accident, as of a bond cancelled by mistake, burnt, or destroyed by any misfortune, or delivered up by fraud, the plaintiff would be intitled in this court; but where a person, with his own eyes open, agrees to alter the security and deliver up the bond, and no fraud committed on the part of the defendant, it is surely otherwise. *Mr. Edwards* was only a surety; no part of the consideration-money paid to him; and therefore not necessary that anything should move from him in discharge. He never looked upon himself as bound any further than in law, and therefore considered the delivery up of the bond as a sufficient discharge; and this would have prevented him from taking any further steps against *Hervey* and *Wilcox* to secure himself, which he might have done if he had not rested easy. Besides, the plaintiff does not come with pure hands; he has made *Hervey* guilty of forgery; and a court of equity will not permit such a clandestine note to bind a third person. This was a fraud intended by him to *Edwards* in delivering up the bond, and at the same time endeavouring to keep him bound by a clandestine note. But a court of equity of all things avoids such underhand agreements.

HARDWICKE, Lord Chancellor. I have had some doubts during the hearing of the cause, but am at last fully satisfied, that the plaintiff is not intitled to relief. It appears, that the defendant was only a surety, and has been guilty of no fraud himself. As to the general point, there is no question but there are many cases in which a debt may be discharged, but a court of equity will set it up, and that against the sureties as well as the principal. If a bond be destroyed by accident, the surety is liable in this court as well as the principal. So if one of the principals shall procure the bond to be cancelled by fraud, upon a bill this Court would set up the bond against the surety as well as the principal, because a creditor shall not be prejudiced by the fraud of one of his debtors against the rest. But the present case does not come up to any of these; for here were second securities set up for the very purpose of discharging *Mr. Edwards*, and that with the knowledge and consent of the plaintiff himself. The defendant did not at all appear in the transaction; *Hervey* and *Wilcox* settled it in their own manner; and *Mr. Skip* was left to judge for himself what kind of satisfaction he would take. Provided *Edwards* was left out, he might have refused intirely, but instead of that he accepts of two drafts, and a goldsmith's note, &c. It is a very unusual thing for goldsmiths notes to be made two days after the draft; and therefore his accepting of such a note from *Hervey* shews a confidence in him and the securities which he gave him. *Mr. Edwards* did not think proper to trust them any longer, but the plaintiff did; and the rule of this court is, that he who trusts most shall lose most. Suppose *Mr. Skip* had refused to do this, and the bond had not been delivered up,

up, *Edwards* might have arrested *Hervey* and *Wilcox* when he thought proper, and have taken care of himself. It was not a right thing of *Mr. Skip* to accept the clandestine note; for what was the scope of the whole transaction? It was, that *Mr. Edwards* should be discharged. The taking of the note was therefore a deceit on *Mr. Edwards*, by delivering the bond up and making him believe he was discharged, and at the same time endeavouring privately to continue him bound by virtue of this note. And this rebuts the fraud on the part of *Hervey*, with respect at least to the present defendant, *Mr. Edwards*. And therefore I AM OF OPINION upon the whole, that the plaintiff is not intitled to relief: there was no fraud on the part of *Mr. Edwards*; the nature and design of the transaction was to discharge him; the plaintiff was acquainted with this design, and was at liberty to make his own bargain; he has thought fit to change the security for one which the defendant is not bound by. But I do not think this so clear a case as to dismiss the bill with costs.

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against
Edwards.

Willshaw against Smith.

Case 149.

In Chancery, Trinity Term, 1744.

BILL to redeem a mortgaged estate upon payment of principal and interest down to a certain day only. The premises were mortgaged to the defendant for three hundred pounds. The plaintiff gave notice in writing, that he would pay it off, and came to the defendant's house with the money, agreeably to the notice. The plaintiff brought an assignment of the mortgage in his bosom, which the defendant refused to execute; upon which the money was carried back again.

On a tender to redeem a mortgage, the mortgagee is intitled to have a reasonable time to peruse the assignment.

The question was, Whether this was such a refusal in the mortgagee as should stop his title to interest, and consequently the costs of this suit?

FOR THE DEFENDANT. A refusal to stop interest must always be an absolute refusal, and not a conditional one. This was only conditional; for the defendant refused to execute the assignment, if the plaintiff would not let him have time to peruse it by himself, and Counsel. This was a reasonable request; and for a person to execute a deed without having it examined by somebody who understands it, is something too hard for this Court to require; and therefore this will not be looked upon as a proper tender to stop interest. Besides, the plaintiff has laid by for near two years since the refusal, and this delay shews his acquiescence under the reasons which were then given.

FOR THE PLAINTIFF. The time then before filing the bill was but a year and a quarter, and no interest paid in the mean time; so that nothing has been done by the plaintiff to waive any right or privilege that he might claim on account of the tender; and as a tender

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tender was made, it was their business to have come first into this court. Our witnesses deny that the mortgagee desired time to peruse the assignment, or that the plaintiff refused him the liberty of doing so; and the mortgagee is not to put the mortgagor to the expence of bringing a bill into this court to have a redemption.

HARDWICKE, *Lord Chancellor*. I have hardly ever seen a cause of this sort where bills have been brought to redeem upon suggestion of a tender that has been for the benefit of either of the parties. Such suits are generally worked up by some troublesome practitioner who has a mind to have a cause; some country attorney, who first persuades the party to make a tender, and then, if the least dispute arise, a bill is brought into this court to redeem without payment of interest. But there are very few of these instances wherein the Court decrees the interest to be stopped, nor shall I do it in the present case: for, in the first place, the *tender was not strictly a legal one*; but as nothing has been objected to it by the defendant, I shall lay no stress upon that. As to the assignment, there is no doubt but the defendant had a right to insist upon its being perused by somebody who understood it. A man is not obliged to execute a deed before he has time to consider of it. The plaintiff, if he had a mind the whole business should be transacted at that time, ought to have sent a draft of the assignment some time before; and as he has not done so, the defendant's request that it should be left in his custody was very reasonable; and if the plaintiff had complied with this, he might himself have appointed the day for payment afterwards; and then, upon the defendant's refusal a second time, he would have been regular in applying to this Court. There is a contrariety in the evidence; but I think credit ought to be given to the defendants. The plaintiff's witnesses swear, that the defendant absolutely refused to take the money. The defendants agree that he refused; but for what reason? Because he would take further time to consider of and peruse the deed. This is going further, and seems to be more fair than the plaintiff's evidence. Besides, this is corroborated by what they say afterwards, and which is not denied by the plaintiff, that he went up stairs to fetch the mortgage-deeds, and was ready to receive his money, till this dispute arose. Therefore I am of opinion, that the plaintiff can only redeem upon the common terms, *viz.* upon payment of principal, interest, and costs.

Case 150.

Dillon against Green.

In Chancery, Hilary Term, 1743.

In what cases the court of chancery will permit a new special original to be filed after a judgment by default. **T**HE PLAINTIFF had letters of exchange drawn by a merchant at *Lisbon* upon the defendant, his correspondent at *London*, payable thirty days after sight. They were shewn to and accepted by the defendant on the twenty-ninth of *October 1743*, and the plaintiff, before the thirty days were expired after which the money was to become payable, brought his action. The original in the action was

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taken out, and bore *teste* the fifteenth of *November 1743* (though the time of payment was not till the twenty-ninth), and was returnable the last day of *Michaelmas Term*. Upon a return of the original, a *capias* was taken out, returnable the first day of *Hilary Term*. Judgment afterwards went by default, and was entered up; and the defendant brought error into the House of Lords; and assigned for error, that the original bearing date before the day of payment, the action was commenced before the cause of action arose. Upon this the defendant applied to this Court, and got an order from the Master of the Rolls, that a new special original should be filed, bearing date the last day of *Michaelmas Term*, returnable the first day of *Hilary*.

This order was moved to be discharged by THE ATTORNEY-GENERAL, upon suggesting, that this, was an error in substance, and not in form; for that the commencing a suit against a person for a debt before it was actually due was a very substantial act of injustice, and so illegal a method of proceeding as deserved not the sanction of this Court: that this case, therefore, did not fall within the reason of any of those cases where, for any irregular proceedings in the forms of law, or where, perhaps, judgments have been obtained without any original at all, this Court has interfered in ordering originals to be filed: that if the commencing an action before the cause of action arose should be encouraged by this Court, great inconveniencies would ensue: that, after all, if the plaintiff could obtain an original in this case, as he desired, the consequence would be, that the original and the *capias* would both bear *teste* and be returnable the same days, which would be absurd; for it is a known rule, that a *capias*, which is founded upon an original, cannot be taken out until the return of the original, and cannot be returnable of itself until fifteen days, at least, after it is taken out.

Pond v. King,
Mich. 20, Geo. 2.

For the other side was cited, by MR. CLARKE, *Philips v. Philips*, on the thirteenth of *December 1737*.

HARDWICKE, *Lord Chancellor*. The question is, What authority has this Court to interfere in supplying new originals? and the determination of it will depend more upon the authorities and precedents than upon the reason of the case. It is said, the defendant has been sued before the cause of action accrued. How? By the original's bearing date before the day of payment. This certainly is error, but there seems to be no substantial injury in this error; for there is no doubt but by the late invented method of *latitats* and *capias's* founded upon *clausum fregit* originals the defendant might have been brought to appearance as soon as he was in the present case. Where then is the injury? This is a special original *capias*, setting forth the particular nature of the case, and is a much slower method of proceeding than that upon *clausum fregit* originals. There are many instances where a *capias* upon *clausum fregit*, &c. has been taken out without any original at all previous to the *capias*. The judgment subsequent to such process is certainly void in itself; and yet in these cases (notwith-

standing

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standing the intent of the party in neglecting to take out an original seems to be to defraud the crown of its revenue), the constant practice is, that upon application to the Curfitor within seven days after the judgment, an original will be granted of course: if the party suffer the seven days to lapse, he must then apply to the Court for a special order, and the Court will grant it him. The case of *Lofters v. Baker* was thus: The defendant was indebted to the plaintiff in the sum of one thousand four hundred pounds. The plaintiff, who had for several years been abroad, returned to *England* on the seventh of *May* 1737, and upon his return brought his action for the debt in the king's bench. The original bore *teste* the sixth of *April* 1737, returnable the first day of *Easter Term*. The defendant pleaded the statute of Limitations. To which the plaintiff replied, that he had been beyond the seas, and that he returned the seventh of *May* 1737, and brought his action within six years after his return to *England*, which was sufficient according to the statute. But it appeared, that the *teste* of the original bore a date *prior* to his return, which was, therefore, inconsistent with his reply, and excluded him from the saving of the statute. However, upon application to this court, the Master of the Rolls ordered a new original to be filed, bearing a date subsequent to the seventh of *May* 1737, which was the day of his return. This case comes very near to, and is full as strong, as the present. But upon the reason of those other cases where judgment has been permitted to go by default, and afterwards error assigned for want of an original, and in which this Court has always interposed in ordering originals to be filed, I think that I might determine that this order should stand. There can be no injustice in doing so; and I think there will be no harm in putting a stop to that common method of letting judgment go by default, and afterwards assigning for error some default in the proceedings.

Case 151.

Walsh against Patterson.

In Chancery, Michaelmas Term, 1742.

In what case the disjunctive "or" shall be taken to mean the conjunctive "and."

J. S. devises his lands in this manner: "As to all my real estate wherewith I shall die possessed, I give and devise one-third part thereof unto my wife, her heirs, and assigns, for ever; and the other two-thirds I give to my son *John*, his heirs and assigns, for ever; but my mind and will is, that in case my said son should die before his age of twenty-one years, and without leaving any issue behind him, or in case any such issue should die before they attain their age of twenty-one years, that then the said two-thirds should go to my wife and her heirs for ever." Afterwards, by a codicil reciting that he had disposed of his estate *ut supra*, he now wills, that in case his said son should die before his age of twenty-one years, without issue as aforesaid, that then the estate should go to his wife for life, remainder to *Stephen Dickenson* in tail, remainder to *John Dickenson* in fee. The testator's son

John

John attained his age of twenty-one years, and afterwards died without issue, leaving a legacy of five hundred pounds to the plaintiff, charged upon the lands above-mentioned.

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The question was, Whether *John* took such an estate under his father's will as should be liable to his debts and legacies?

And it was argued by THE SOLICITOR-GENERAL, that this was an estate-tail in *John*, and therefore not chargeable with his legacies; for though, in the words of the will, the conjunction *and* is made use of, which couples the two contingencies together, so that they must both happen before the devise ever can take effect, yet by the codicil it is otherwise, for the conjunctive *and* is by the codicil changed into the disjunctive *or*; and this makes an alternative, *viz.* in case the said *John* should die before twenty-one, or in case he should die without issue, then the estate should go over; and a codicil has power to alter, correct, or explain a will.

HARDWICKE, *Lord Chancellor*. The words *or* and *and* make no difference; for it has always been determined, that where an estate is given to a man and his heirs, and in case he die before twenty-one, *or* without issue, that in such case the word *or* shall be construed *and*, for this plain reason, that if a contrary construction should prevail, the devisee might have a son born before twenty-one, and if the father should die without attaining that age such son would be disinherited.

MR. SOLICITOR-GENERAL. The case of *Searl v. Garrard*, in *Cro. Eliz.* and *Moor*, 422. is a case in point; and there the Judges were of opinion that it was an estate-tail. And as to the hardship mentioned by your Lordship, if the party has made such a disposition of his estate, it cannot be remedied. And of that opinion was your Lordship in the case of *Bellasis v. Uthwait*, some time ago in this court, where one devised an estate to his daughter, but in case she died before twenty-one, remainder to a charity; the daughter died before twenty-one, leaving a child behind her; yet determined, that the estate must go over, for that however it might be the testator's intent that it should go to the issue of his daughter, if she had any, yet as he has left out those words the Court cannot supply them.

Sed non allocatur; for by THE LORD CHANCELLOR, this cause seems extremely plain. The testator, at the time of making his will, had a wife and a son; he devises one-third of his estate to his wife in fee, and the other two-thirds to his son, his heirs and assigns for ever. If he had stopped here it had been a fee, but he follows it with a clause of contingency, *viz.* that in case his son should die before twenty-one, and without leaving any issue behind him, or in case such issue should die before twenty-one, then to give the remainder to his wife in fee. Upon these words of the will there can arise no doubt but here is the proper conjunctive *and*; and therefore this clause cannot be intended to turn the fee into

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into a tail, but it is an executory devise to arise upon a contingency; and this contingency being to happen within the compass of a life in being, or twenty-one years afterwards, is therefore a good devise over. But then comes the codicil, in which, having first made a true recital of his will, he then says his mind is, that in case his son should die before twenty-one, or without issue as aforesaid, that the remainder should be to his wife for life, remainder to *Dickenson, &c.* And it is contended, that by the disjunctive *or* in this codicil it was the testator's intention to change that which was but one single contingency in his will into a double or alternative one; that is, that if he died before twenty-one, or if he died without issue, in either of these cases the remainder should vest. But it is my opinion, that the only meaning of the testator by his codicil was to alter the remainder, and to carry it over to the family of the *Dickensons* after the death of his wife, which by his will he had not done. But if there had been no such circumstance to answer the intent of the testator, I should have been of opinion, that the word "*or*" must be construed "*and*," for the reason I mentioned before: and there is a case in *Cro. Car.* I think it is *Spalding v. Spalding*, exactly to that purpose.

Case 152.

Furnivall against Crew.

April 27, 1744.

In what cases
covenants in a
lease are to be
understood as
covenants of
perpetual re-
newal, or not.
S. C. 3, Ark. 83.

THIS was a bill brought to enforce the performance of covenants.—*John Crew*, the defendant's grandfather, being seised of lands in fee in the county of *Chester*, by lease, bearing date 1682, devised the same to one *Thomas Moor* upon three lives, reserving a rent of forty-three pounds eight shillings *per annum*, subject to heriots, &c.; in which lease were these two covenants:

COVENANT ON THE PART OF THE LESSEE.

"That he, the said *Thomas Moor*, his executors, administrators, and assigns, shall at the death of any of the lives abovementioned which shall first happen, pay unto the said *John Crew*, his heirs and assigns, within twelve months next ensuing such death, the sum of sixty-eight pounds, in the name of a fine, for to add one other life to the remaining two lives abovementioned, and so to continue the renewing of this lease or leases, paying as aforesaid to the said *John Crew*, his heirs and assigns, the sum of sixty-eight pounds for every new life so added and renewed as aforesaid, from time to time, according to the true intent and meaning of these presents."

COVENANT ON THE PART OF THE LESSOR.

"That he the said *John Crew*, his heirs, executors, and assigns, shall and will, for the consideration of the said sum and sums of
" sixty-eight

" sixty-eight pounds as aforesaid, to be paid to the said *Crew*, his heirs, executors, or assigns, at *Crew Hall* aforesaid, or at the place where the said hall now stands, seal and duly execute one or more lease or leases, under the same rents and covenants with these presents, and therein to add such life or lives of such person or persons as shall be then nominated to be added by the said *Thomas Moor*, his executors, or assigns, within the space of twelve months next after the death of any such life as aforesaid, according to the true intent and meaning of these presents."

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There was likewise another lease of lands of less value, dated 1681, from the same *John Crew* to one — — —, in which were inserted the same covenants *mutatis mutandis*. The plaintiff being possessed of both these leases, and having upon the dropping of a life in each made application to the defendant to renew, which was refused, has now brought his bill in order to have a specific performance of the covenant of renewal contained in these two leases. That which is insisted on by the defendant in his answer is, that by the covenant of the ancestor, *John Crew* the lessor, he is obliged to renew only upon the death of either of the three lives mentioned in the original lease, and not upon the death of any life that has been since added; and likewise, that he is not obliged to insert the covenant for renewal in any future leases. Which is denied by the plaintiff.

The question for the Court was, Whether these covenants are to be understood as covenants for perpetual renewal or not? that is, Whether the defendant shall be obliged to renew upon the dropping of every added life as well as the original lives? or, Whether it shall be confined to a covenant for renewal upon the dropping of each of the first three lives which were in being at the time of the original lease?

And it was argued by MR. ATTORNEY-GENERAL, MR. CHUTE, and MR. WILBRAHAM, that the plaintiff is entitled to a renewal, and likewise to perpetuate this covenant through all future leases. First, From the construction of the covenants themselves. The covenant on the part of the lessees consists of two branches. The first branch extends plainly no further than the first renewal; but the additional words in the second branch, "and would so continue to renew," &c." mean, that the covenant shall be perpetuated. The first part of the covenant only specifies the nature of the renewal; the latter part is to continue that renewal through an indefinite time; there are no words which limit when it should determine, either by efflux of time or otherwise. The gentlemen, perhaps, may say, that by the words "aforesaid" in the second branch, the intent of the parties is confined and tied down to such renewal as is mentioned in the first. But if these words are capable of such a sense, they will prove that we have no right to more than one renewal, for the first branch is plainly descriptive but of one renewal; and if the second gives no greater

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greater latitude, we shall not then be intitled to what they themselves allow we are intitled to, *viz.* a renewal upon the death of each of the first three lives. But these are not the operate words on which we found our claim; the words on which we insist are, "and so continue to renew, &c." In the covenant on the part of the lessor, the words "at *Crew Hall*, or at the place where the hall now stands," shew, that a perpetuity was intended by the parties, and that they calculated for a longer duration than that of three lives. The words "renew under the same rents and covenants" must mean, that the same covenants of renewal, as well as the other covenants, should be continued; and unless the sense of these words be quite construed away, the plaintiff must have judgment in his favour. "After the death of any such life as *aforsaid*," at the latter end of the lessor's covenant, ought to relate to the immediate antecedent, and not to the first branch of the first covenant; and the immediate antecedent is an added life; so that these words amount, in fact, to the same as if it had been to renew after the death of any such added life as *aforsaid*, which is the construction we contend for. According to their construction, a case may happen of absurdity. Suppose upon the dropping of one of the original lives the lessee should renew, and fill it up with another, and afterwards the new life drops, according to them we are not entitled to a renewal. Suppose then, afterwards one of the two remaining lives should fall, then, say they, there arises a right of renewal: And how shall we renew? Shall the lessee pay a double fine for one renewal? or, Shall the lessor grant two additional lives upon receipt of a single fine only? Either of these would be absurd, and contrary to the express terms of the covenant. There is a way of construing deeds which is very well known, and very frequently made use of in courts of justice; and that is, where the parties themselves, by way of their actions, have shewn what was their construction of their own deeds. The construction which is put by those who made the deed does very justly influence the construction of the Court. In the present case, there have been two renewals upon one of the leases, and three upon the other; and one of them in each lease is founded upon the supposition which we contend for, *viz.* upon the death of an added life; and in every lease which has been renewed, the covenant for renewal has been inserted in the very same words with that in the original lease. This shews clearly, that it was the opinion of the defendant's ancestors, that the covenant in the original lease was a covenant for a perpetual renewal. And on our side likewise the words were understood in the same sense; for we shall shew, that we have gone on in making very great improvements on the premises in contemplation of the lease being perpetually renewable. The case of *Bridges v. Hitchcock*, the twenty-fourth of June 1715, is in point to the present purpose. That was, a lease of certain mills from *Bridges* to *Hitchcock* for twenty-one years, with a covenant, that upon request of the lessee six months before the expiration of the said term the lease should be renewed in what manner soever he should

1. Brown Cases
in Parl. 522.

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should desire, but upon the same rent and covenants with the present. The lessee applied accordingly six months before the term expired, but the lessor refused to insert the same covenant of renewal in the new lease. Upon a bill brought in the exchequer the Court determined, that the lessor should renew with a new covenant of renewal; and this was afterwards affirmed in the House of Lords. In this case there were no other words to found the determination upon, but merely the words "upon the same rents and covenants." There were no words to shew, that the parties had more than one renewal in view. Besides, the covenant there was not mutual; there was no covenant on the part of the lessee to accept: so that in that they went further than a court of equity will sometimes do. That case is therefore stronger in every respect than the present, and is in point to shew, that where there is a covenant to renew with the same covenant, *that* extends to a renewing or perpetuating the covenant of renewal. Though the present case is not worded quite so properly as it might be in order to constitute a perpetual covenant, yet it is much more improper for the construction which they contend for. An implicit covenant of renewal is as good as an explicit one. He does not covenant to renew *in perpetuum*, but he covenants to renew with the same covenants, which is implicitly a covenant to renew perpetually. Leases of this sort for three lives are become a sort of tenure in the country; and it is a discredit to the lord not to accept his tenant when he comes with his money in his hands. No argument ought to be drawn from its proving a beneficial bargain to the lessee; for if the lands had grown worse, if they had been overflowed by the sea, or the rents had sunk by the loss of trade in a town, or by any other accident, the lessee had been obliged to pay the sixty-eight pounds, and therefore the remedy ought to be mutual. At the time the lease was made, it might have proved for the benefit of the one or of the other, *non constat* which; and therefore no conclusion should be drawn from thence.

MR. SOLICITOR-GENERAL, MR. BROWN, and MR. FENWICK, *for the defendants*. The question for the determination of the Court arises upon the construction of a covenant contained in two leases; one dated 1681, the other 1682. In the year 1682, subsequent to the first lease and precedent to the second, a settlement was made between Crew the lessor and trustees, whereby all his lands in *Chester* (amongst which are the premises in question) were settled to the use of himself for life, remainder to his first, &c. sons in tail, remainder over to every person who should claim under that settlement, to make leases for three lives, such as are allowed by the statute of *Henry the Seventh*, and no other. As this was a voluntary settlement, and not in our power to shew any consideration, the use we shall make of it will not be to defeat the lease by setting up a prior disposition of the premises by the lessor, but to shew, that if the covenant in the original lease was not a perpetual covenant, we are not bound by any covenants contained in subsequent renewals, they being all made by persons

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who by this settlement are restrained from granting any other leases than such as are allowed by the statute of *Henry the Seventh*. The general question is, Whether these covenants are to be understood as covenants for perpetual renewal? Before we enter into the merits, we shall make one or two introductory observations. The perpetual covenants are not contrary to the law of *England*, yet they are so very rarely made use of that no argument can be drawn from, or reverence had to, the custom of the country, in order to explain the words of the covenant. In *Ireland*, covenants of this nature are extremely frequent, and there reference is had to the custom of the country, which generally greatly influences the judgment of the Court, *Lord Saley v. Wheeler*. The consideration-money will deserve the notice of the Court; for if the construction of the covenants should be doubtful in other respects, the Court will judge by the consideration-money what was intended to be purchased; and if the consideration be adequate to a perpetual renewal, that will turn the construction one way; if it be hardly equal to what one would give for that limited renewal which we contend for, that will turn the question the other way. In the present case, the consideration is by no means adequate. The annual value of the estate is seventy pounds *per annum*; it never was less than fifty-five pounds; and the fine to be paid is no more than sixty-eight pounds; whereas fines of this sort are never less than from two to three years purchase. The intent of the original lessor may be collected from the settlement which he made immediately precedent to one of the leases in question. He thereby restrains all those who should come in after him from making any other leases than such as were allowed by the statute of *Henry the Seventh*; and, Can it be said, that it was his intent to make a covenant which should oblige all those who were to represent and follow him for ever, to renew and perpetuate the covenant of renewal, when he himself had by his own act incapacitated them from perpetuating such a covenant? There are several covenants in this lease to oblige the tenants to repair; and from hence likewise may be inferred, that no perpetual renewal was intended; for such covenants had been unnecessary in behalf of the lessor, if it was the intent of the parties that the lessee, upon paying a certain fine, might perpetuate the estate to himself. But consider the words of the covenant. The second branch of the covenant on the part of the lessee cannot be taken as a distinct clause, which the gentlemen have done, for it can signify nothing by itself, and is therefore tied down by words of reference to the first clause: and the first clause says expressly, "the lives above mentioned;" which words plainly relate to the lives then in being, and no other: no mention is made of any lives that shall hereafter be added. The words of the lessor's covenant, which have been so much insisted on, "under the same rents and covenants," are designed for the benefit of the lessor, and mean only that the lessee shall not compel him to renew, but under the same restrictions as were in the then subsisting lease; they can never be construed to extend the power of renewals

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renewals since the death of the original lessee ; for if the covenant in the original lease will not do their business, the continuation of it never can do. Besides, the settlement prevents any of the subsequent covenants from operating otherwise than under the statute of *Henry the Seventh* : therefore the whole must depend upon the original covenant ; and if that be not sufficient, the rest must entirely fail. The case of *Bridges v. Hitchcock*, which has been cited, was very particularly circumstanced : That was a lease of several old decayed mills for twenty-one years, which were to be pulled down and rebuilt in order to set up a trade in brass and iron ; very great hazards were run, and very great expence incurred, in setting up a manufactory : there was an express covenant that upon notice of six months the lease should be renewed ; the lessee had laid out a gross sum of one thousand eight hundred pounds upon forty pounds a-year, and had, with this great expence, established a trade, which he could not have done but in contemplation of having his lease renewed. The original intent was, that it should not stop at the end of the first twenty-one years. But whether the House of Lords would decree a renewal in a third instance, that is, after the expiration of the third lease, which the lessor by his second had covenanted that he would afterwards grant, *non constat*. It is not there decreed that this covenant of renewal shall be inserted for ever through all future leases. In the case of *Doctors Commons v. the Dean and Chapter of St. Paul's*, a lease was made for ninety-nine years, with a covenant of renewal, "under all and singular the same rents, covenants, and conditions," upon expiration of the lease. *Doctors Commons* brought a bill for renewal. To which the Dean and Chapter answered, that they were disabled by the statute, which had been made since the lease was granted, and that they had now no power to lease for more than three lives, or twenty-one years. But it was insisted, that at the time of making the first lease they were at full liberty, and that that covenant being before the statute was binding to them. The opinion of this Court and of the House of Lords was, that the Dean and Chapter should be obliged to renew for forty years, and there it was to end. This plainly shews, that it was the opinion of the House, that the original covenant should not be construed a covenant for perpetual renewal, because as the Dean and Chapter were, at the time of making the covenant, unrestrained by any statute, and therefore had it in their power to make a perpetual covenant, if they had done so it would have been binding, notwithstanding the subsequent statute. They cited also the case of *Hyde v. Skinner*, *Peer. Wms* 196.

Upon the whole they submitted, that the words of the covenant would be fulfilled and satisfied by the construction which was contended for ; and that by the words, *upon the death of any of the lives abovementioned*, the renewal was expressly tied down to the expiration of the lives then in being.

MR ATTORNEY GENERAL'S *reply*. It has been insisted, that the fine to be paid is not adequate to the value of the fine for per-

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petual renewal in proportion to the value of the estate. But it is impossible to judge at this day whether the fine was adequate or not at that time. The Court must first enquire, What were the general purchases of estates at that time? What was the annual value of this estate at that time? How it has been improved since, &c. The value of land is increased, the interest of money lessened, since this lease was made, and therefore it is impossible to found any judgment upon this matter. As to the merits of the case, and the words of the covenant, it is plain that the first part of the covenant relates only to one renewal; if it stood upon the part of the covenant, we could not be intitled to so much as the gentlemen themselves allow us; and they draw all their arguments from that branch of the covenant; which, if their arguments are conclusive, does restrain us from doing what even themselves allow us a right of doing. The words "renew such lease or leases" are inconsistent with their construction; for if an added life should drop, they plainly signify that the lease shall be renewed upon such death. The fixing upon *Crew Hall*, or the place where it now stands, as the place of payment, shews the parties to have a perpetuity in view, and shews likewise great accuracy in them in settling the place where the money should be paid, to prevent the disputes which might arise during a perpetual renewal. In the case of *Hyde v. Skinner*, 1. Peer. Wms. 196. the circumstances are very uncommon; and LORD MACCLESFIELD seems to have been under great difficulty to split the difference between the parties; and no judgment ought to be deduced from such a case, which is rather a matter of arbitration than otherwise.

HARDWICKE, *Lord Chancellor*, after argument by Counsel, and time taken to consider of this case, delivered himself to this effect: The original bill is to have the benefit of the covenants in two leases made by *Mr. Crew*, the grandfather of the defendant, for three lives each of them, and to have these leases renewed pursuant to the true intention of the covenants, and to have a specific performance of them.

That lease which is the first in point of time is of the estate called *Sandback*, made in 1681 to *Thomas Moore* for three lives; the other lease was made the twenty-fourth of October 1682. of an estate called *Elton* to *Cooper* for three lives also. In each of these leases are covenants penned exactly in the same words; and the first covenant is on the part of the lessee, and the second is on the part of the lessor. First, The lessee, *Thomas Moore*, covenants, "for himself, his executors, administrators, and assigns, with *John Crew*, his heirs and assigns, that the said *Moore*, his executors, administrators, and assigns, or some of them, shall at the death of any of the lives aforementioned, which shall first happen, pay unto the said *Crew*, his heirs or assigns, within twelve months next ensuing such death, the sum of sixty-eight pounds, in the name of a fine, to add one other life to the other remaining two lives abovementioned, and so to continue the renewing of the
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“ lease or leases, paying as aforesaid, from time to time, according
 “ to the true intent and meaning of these presents.” This is the
 whole of the covenant in each lease of the part of the lessee.
 Then follows a covenant on the part of the lessor, who “ for
 “ himself, his heirs, and assigns, covenants and agrees to and with
 “ the said *Moore*, his executors and assigns, that he the said *Crew*,
 “ his heirs, executors, and assigns, shall and will, for the consider-
 “ ation of the said sum and sums of sixty-eight pounds as aforesaid
 “ to be paid to the said *Crew*, his heirs or assigns, at *Crew Hall*
 “ as aforesaid, or at the place where the said hall now standeth,
 “ seal and duly execute one or more lease or leases under the same
 “ rents and covenants with these presents, and therein to add such
 “ life or lives of such person or persons as shall then, and at such
 “ time, be nominated to be added by the said *Moore*, his executors
 “ or assigns, within the term or space of twelve months next after
 “ the death of any such life as aforesaid, according to the true intent
 “ and meaning of these presents.”

The covenants are penned in the same words in both leases, and therefore there can be no difference in this construction of them. The fines are different by reason of the different values of the estates. There is one circumstance in which the leases differ, but it will not influence the determination of the case; that is this: The lease in 1681 was made at a time when *Mr. Crew* was seised in fee, but the lease in 1682 was made at a time subsequent to a voluntary settlement made by the lessor, by which he made himself tenant for life, with remainder to his daughter for life, with remainder to her first and every other son in tail, &c. whose first son the defendant is. But that does not differ the equity of the plaintiff on that lease, because as the plaintiff claims for valuable consideration, and the settlement is voluntary, the lessee will be considered as a purchaser of the lease, and will prevail against the voluntary settlement; and the covenants will bind the land if the plaintiff be entitled to the equity he insists on.

The facts which have happened under the two leases are, that none of the lives dropped during the life of the lessor; but after his death lives dropped, and there have been two renewals of each lease: one of them by the defendant's father and mother, and the other of them by his mother after the death of her husband; and in all four of these renewed lives the same covenants for renewals *in hæc verba* have been inserted as are in the original lease. It has happened since, that in one of the leases all the old *cestui que vies* in the original lease are dead; and in one of the leases the renewal that is asked is on the death of a new life, and not on the death of any of the old lives in the original lease. On the other of the leases it has happened, that the death on which the renewal is now prayed is the death of the last *cestui que vie* in the original lease, and therefore as to that it is admitted, that the plaintiff is entitled to have a renewal of that lease; and the only question between the parties is, what are to be the terms of that renewal, *viz.* Whether

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the plaintiff is intitled to have this lease renewed with a like covenant of renewal as was in the original lease?

The first material consideration is the true construction of these two covenants: and the question upon them will be, Whether the obligation on the part of the lessee to pay or tender the fine, and the obligation on the lessor to renew the lease, was to arise barely on the death of any of the lives which were the *cestui que vies*? And I am of opinion, that by the true construction of those covenants the plaintiff is intitled to have a new lease with the same covenants of renewal; and that this was designed to be a continual perpetual lease. This depends on the construction of the words of the covenant, and on what appears to have been the intention of the parties. The covenant on the part of the lessee is, "that he, his executors, &c. shall, at the death of any of the "lives aforementioned, which shall first happen, pay unto the "lessor, his heirs and assigns, sixty-eight pounds as a fine, to add "one life to the other two remaining lives." It has been insisted on for the defendant, that this first branch of this covenant is confined to the first life which should drop of the lives in the original lease; and so it is: but however that does not influence the construction of the whole covenant, because it was admitted on the part of the defendant, that notwithstanding these words are so confined to the dropping of the first life of the three *cestui que vies* in the original lease, the plaintiff would be entitled to have a renewal. But then what can be the meaning of these words, "and so to "continue the renewing this lease or leases, paying as aforesaid to "the said lessor, his heirs or assigns, the sum of sixty-eight pounds "for every life so added or renewed as aforesaid from time to time, " &c." It was insisted on for the defendant, that this means only the continuing or renewing the lease by adding a new life on the death of any one of the lives in the original lease, and not to add a new life on the former new added lives; and that that will satisfy the words of the covenant. But however by any narrow construction it might be said to satisfy the words, yet I think it would not satisfy the true construction of the covenants. The words "so to continue the renewing this lease or leases" does not mean only "to add new lives on the death of any of the *cestui que vies*," but the continuing the estate and filling or keeping up the number of lives, for that is what in common expression is meant by continuing a lease. But there is something more to shew this to be the construction; for it is not only "to continue the renewing this "lease," but "this lease or leases;" and the word "or" must receive the same construction as the word "and;" for undoubtedly that must be admitted on the part of the defendant, that "the renewing this lease or leases" must mean the renewing some new-granted lease. Suppose one of the lives in the original lease dies, no new life can be added by granting a separate lease, but the lease must be renewed for the two lives remaining and a new added life; or suppose another life dies, Must not that be renewed? Undoubtedly it must; and therefore the words "lease or leases" must

must be admitted to comprehend some new lease: And if so, Where will you stop? If it is so comprehended, some new lease to be made by virtue of these covenants, why will it not comprehend the last lease which shall be granted on the death of the last *cestui que vie* in the original lease? And if it will comprehend it, then this is a covenant not only to renew the present lease, but all others which shall be made pursuant to these covenants, if this be the true construction of the covenants on the part of the lessee.

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And the next consideration is, the true construction of the covenants on the part of the lessor. And he covenants, that "he, his heirs, executors, and assigns, shall and will, for the consideration of the said sum of sixty-eight pounds as aforesaid to be paid to the lessor, his heirs or assigns, at *Crew Hall* aforesaid, or at the place where the said hall now stands, seal and duly execute one or more lease or leases under the same rents and covenants with these presents, and therein to add such life or lives of such person or persons as shall then, and at such time, be nominated to be added by the lessee, his executors or assigns, within the space of twelve months next after the death of any such life as aforesaid." Here is a covenant from the lessor to grant "a new lease under the same rent and covenants with these presents," which undoubtedly take in the covenant for renewal. It has, however, been insisted on for the defendant, that "any such life as aforesaid" means the lives in the original lease. But there are no words to continue it to them, and I think it means any of the lives before described: for it is not said, that the lessor shall add such life to the two remaining lives, as it is in the covenant on the part of the lessee; but it is general, that he should grant an estate "for the life of such person as shall be nominated to be added, within a year after the death of any such life as aforesaid." What is "any such life as aforesaid?" it is large and comprehensive enough to take in as well the added as the original life, for both of them are mentioned before.

There are two circumstances in the covenants which favour this construction for the plaintiff: One of them is, that the lessor covenants to renew the lease on payment of the fine, &c. at *Crew Hall*, or at the place where *Crew Hall* now stands. Perhaps much weight is not to be laid on this; but yet I do not think, that the drawer of the lease would imagine that *Crew Hall* would be demolished in the compass of three-lives: I dare say this family had not that opinion of it.

The other circumstance is of more weight, that in the way the defendant contends for the renewal of this lease, there never was an instance in this kingdom, or in any other, of any tenant's contracting for such a lease, the terms of it being the most disadvantageous that can be on the part of the tenant. It is natural that a man should contract for a perpetual renewal; but they say, he did not do that, but only for two leases for three lives; but for such a lease only no man would contract in this way, that on the death of

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any one life he should be bound to pay his fine, and then if the new life dropped he should have no renewal, but it should remain on the old lives, for if one of the old lives dropped he should have a renewal. In this way the tenant must pay two fines for the renewal of his lease, and yet the whole lease determine on the death of the last life originally granted. That is very natural, if a man intended to have a perpetual renewal; but it is not at all natural if he contracted only for two lives leases; but the natural way to have contracted for two leases for three lives would be to have the second lease arise on the determination of the first.

The next thing which deserves to be considered is, what has been objected on the part of the defendant, that no breach could be assigned at law in any action of covenant against the heirs at law or executors of the lessor. But I am of opinion, that if this be the true construction of the covenant, that at law a breach might be assigned upon it, and that on the words "so to continue the renewing this lease or leases, paying as aforesaid sixty-eight pounds for every life so added;" for if this means to contract the renewing every further or future life, then the not paying or tendering the money would be a breach of the covenants on the part of the tenant; and if an action was brought by the lessee, a breach must be assigned by not granting a lease under the same covenants "on the death of any such life," which I think means, "any life abovementioned;" and agrees the two covenants must be commensurate or co-extensive with each other.

But if a breach might be assigned at law by either of the parties, the question will be, Whether this is a proper case for relief in equity? And I think it very proper on two reasons: the one from the nature of the covenants; the other from the condition of the persons seeking the benefit of these covenants. First, From the nature of the covenants. It is to make an estate in land, and consequently is one of the most proper cases that can be for equity to interpose in by way of specific performance, because this Court can give the estate itself; but at law nothing can be recovered but damages; and therefore the relief here is higher and more adequate than at law. Secondly, In respect to the condition of the persons for these reasons: If an action was brought at law, it could only be against the executor or administrator of the original lessor, or against his heir at law, if he has assets; the defendant is his heir at law; but perhaps he has no assets, because the whole estate was settled; and if this were the case, then the representatives ought to recover against the heir at law out of real assets descended, when in equity this is a covenant which binds the land and goes along with it; and therefore this Court gives relief against the proper person who is in possession of this estate attended with this lien upon it; whereas at law satisfaction would be recovered against him who in mere equity and justice is not the person who ought to make it.

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It was insisted for the defendant, that these covenants of perpetual renewals are not to be favoured, because they take the estate from the owner of the inheritance. This may be in part true, but, however, contracts for valuable consideration must be performed. The original lessor might have granted the whole fee, or have charged it in such manner as he pleased: and the only question is, Whether he has done it? If he has, it ought to be supported?

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There are several instances wherein this Court has decreed perpetual renewals *are not to be*. But it is objected, that the fines given by the tenant are not adequate, and that that is such an ingredient in the case as will induce the Court not to decree a specific performance. But on the evidence nothing excessive or very disadvantageous to either party has appeared; but it is a much more favourable case than some of those in which most such renewals have been decreed. In the case of *Hyde v. Skinner*, 2. *Westm.* 196. though the Court did not decree a perpetual renewal, yet they decreed a new lease, and that notwithstanding the original lease had been once renewed; and yet neither in the case of *Bridges v. Hitchcock*, in the House of Lords, 1715, was there any fine to be paid upon the renewal, as there is in the present case, and that a very large one of sixty-eight pounds for every renewal of one of the leases, and for the other, wherein the lessor has taken care that his successors in the estate shall have a consideration paid on every renewal; which makes it a much more favourable case than where it is to be without any fine.

Another objection was, that the plaintiff asked a renewal of this lease with the like covenants of renewal as in the other lease; and that cannot be; and that it must have been in prospect of the parties that the successors in the estate must not be in a condition of giving such an estate, or of laying their heirs under an obligation to do a thing which, from the nature of their estate, they could not. But in answer to this it was rightly said at Bar, that when such renewals are made they arise out of the original covenant given by the first lessor, who had power to bind the land, and these covenants run along with it. And I do not imagine that the covenants are agreeable to the nature of this estate: and the Court will not decree him to enter into any covenant farther than his estate goes. It would be unreasonable, that the defendant, who is but tenant for life, should covenant that he and his heirs will from time to time renew this lease, but he shall covenant that he and all claiming under him shall renew it; and the original lease shall be deposited with the Master, so that it may appear on what foundation it is subsisting. Another fact in this case is, that there have been two renewals of these leases; one by the father and mother of the present defendant, and the other by his mother; and those have been each of them with covenants in the same words as these in the original lease, though the lessors who renewed were but tenants for life. That was an inaccuracy; but notwithstanding that, and though the defendant is not bound by it, yet it shews what was the sense

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sense of the family; for though these renewals were only on the dropping of the lives in the original lease, yet the giving such a covenant for renewal shews their apprehension to be that it was a covenant for a perpetual renewal.

The authorities which have been cited are but few, and do not come up to the present cases. One was the case of *Doctors Commons v. the Dean and Chapter of St. Paul's*: A lease was made on February 2, 1567, for ninety-nine years, before the disabling statute of *Elizabeth*, in which was a covenant, "that if the lessees or their successors should, at any time during the ninety-nine years, surrender the said lease, that on request the Dean and Chapter, the lessors, or their successors, should grant another new lease of the premises for the fine of twenty pounds for a number of so many years, and with all and singular such covenants and conditions contained in the original lease." After this the statute 13. *Eliz.* c. 18. enacts, that "all leases by bodies corporate for a longer term than twenty-one years, or three lives, shall be void." A bill was brought in chancery for a term of forty years against the Dean and Chapter to have a renewal of this lease on the same terms and covenants as are in the original lease. But the House of Lords decreed the lease to be made by the Dean and Chapter for a term of forty years, agreeable to the power they have in 14. *Eliz.* c. 11. "Cities and Market-towns," but without any covenant for renewing again. That was on a particular reason, that by some of the restraining statutes these bodies corporate are restrained from giving bonds or covenants in consideration to the statutes that restrain leases, because that was one way of evading these statutes; and therefore the latter restraining statutes have made these bonds and covenants void: therefore the House of Lords would not decree new covenants, which would have been void, and contrary to the statutes.

As to the case of *Hyde v. Skinner* (a), cited for the defendant, that cannot be made use of as an authority in this case, nor indeed can it hardly be made use of as an authority in any. There the lease was for five years, with a covenant to renew, without any fine to be paid on the renewal of the same rents and covenants, and for such term as the lessee should desire; the administrators of the lessee demanded a lease for fifty years on the general words of the covenant; and LORD MACCLESFIELD was of opinion, that there should be a renewal, but not for so long a term, and therefore decreed a lease for twenty one years. On the generality of the words of the covenant there was no ground to refuse the plaintiff the term of years which he asked, and there is nothing which appears to reduce it to any other term but the original lease, and that was for five years, for which term also it had been once renewed; and therefore this is rather a compromise than a decree.

(a) 2. Peer Wms. 106—See also and Tritton v. Foote, 2. Bro. C. C. Russell v. Darvan, 2. Brown's C. C. 636.
639. *note.* Cook v. Booth, Cowp. 819.

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The case of *Bridges v. Hitchcock*, decreed in the House of Lords June 24, 1715, comes nearer to the present case than any that has been cited. In that case the covenant was, that if the lessee, his executors, administrators, or assigns, should, at any time thereafter, be minded to renew and take a further lease of the premises, that on application made before the last six months of the term the lessor, his heirs or assigns, should grant such further lease as should be desired by the lessee, his executors or administrators, without any fine, and under the same rents and covenants, &c.; a bill was brought for the renewal; and the question was, Whether it should be a renewal with an insertion of a covenant to renew? or, Whether the words, "under the same rents and covenants," should not be confined to the ordinary covenants of payment of the rent, repairs, or the like? And the Exchequer directed a new lease to be made with the same covenant for a renewal which was in the former lease; and that decree was affirmed in the House of Lords. That case was liable to more objections than the present, because there was nothing but a covenant on the part of the lessor, and none on the part of the lessee; and therefore it would be reasonably said, that "the same rents and covenants" mean the common covenants attendant on leases, and not to take in the covenant for a renewal. In the present case there are mutual covenants; the lessee covenants to pay his fine, and the time and place for payment of it are ascertained: but in the case of *Bridges v. Hitchcock* no fine was to be paid on the renewal. But it was argued for the defendant, that in that case there should have been great improvements, and that it was considered as a building-lease; and no doubt but that had great force in the case: but yet that reasoning does not extend so far as the decree went; if they had built on that only, they might have granted another term for twenty-one years, and that would have been thought a very reasonable satisfaction for the improvements: consequently the argument drawn from the improvements could not be that on which the decree was founded, which was by a perpetual renewal; and therefore it must rest on the construction of the words of the covenant.

Agreeably to this authority, and the construction of the covenants, I MUST DECREE a renewal of these leases under the same rents and covenants that are in the original leases; but these covenants must be reduced to such as the defendant, from the nature of his estate, can enter into.

Gibblett against Read.

Case 153.

In Chancery, Easter Term, 17. Geo. 2.

THIS BILL was brought by all the children of the late James A share in a
Read, printer of the *St. James's Evening Post*, against his newspaper shall
widow and executrix. The plaintiffs claimed under the will and be considered as
custom of London. the personal pro-
prietor, and the profits of printing the same subsequent to his death be distributed accordingly.

And

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And the single question was, Whether or no nineteen shares out of twenty of the profits of printing that paper subsequent to the testator's death were part of the said testator's personal estate, and as such to be accounted for by the defendant?

HARDWICKE, *Lord Chancellor*. It is a very clear case; and though it may be difficult to define the various natures of property, yet it may, notwithstanding, be transmissible to representatives. And I am of opinion that this is so; and if the bill had been by creditors, there would have been no dispute. *James Read*, the father, appears to have purchased his several shares in this paper from several sharers or partners. It is proved, that shares in the printing of newspapers are valuable, and that the representatives of some of these sharers have taken them as part of the personal estate of the partner, and that the testator *Read* purchased of such representatives. All things of this sort ought to be taken according to the known nature of the dealing, and the method of the parties considering these matters and carrying them on. *Lintot* had a one twentieth share of this paper; and the defendant continues it for six months after her husband's death, and accounts with *Lintot*.

There are many cases where no part of the profit of a testator has been employed or made use of in carrying on the business, and yet the executor has been accountable for the profits of the business as the testator's personal estate. The case put of physical secrets or nostrums, where every thing was carried on by the materials purchased after the testator's death, and yet the nostrum is part of the personal estate of the testator. This has been resembled to the case of a shoemaker; and in that case, Suppose the dealing has been extensive, and carried on in partnership, and with the father's stock, the son, who is executor, would be accountable. Suppose the house were a house of great trade, he must account for the value of what is called the good-will of it. Could not the defendant have sold these shares? Did not *Walker's* representatives sell them? Could not the husband have given them by will? and if he had, Would she not have been accountable? As to the argument, that others might have printed it as well as *James Read* or the defendants; so in the case of *Tipping*, if anybody had thought of his nostrum, as he had no patent, any discoverer might have sold it. But what is strong here is, its having been in partnership; and being so, there is a sort of secret in the business, and a certain expence in procuring intelligence. And it would be a deceit and a fraud on the parties if this Court did not consider things on the same foot as purchasers of a thing of this sort did. I am clearly therefore of opinion, that *Mrs. Read* must be accountable for the profits of this paper. And the only question is, How? For I go on this foot, that it was a valuable thing at the testator's death; she might have sold it, and ought to have sold it; and then all the losses to which it is said those matters are liable would have been prevented; and the best method seems to me, for the Master to set a value on those shares at the testator's death, and the defendants

defendants to account with the plaintiffs for the principal, with interest for the same at five *per cent.* from the testator's death.

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READ.

Jones against Legg (a).

Case 154.

In Chancery, February 1, 1743.

ROBERT LEGG devised a house to his daughter *Marthana Legg* for her natural life; and after her decease he willed, that the same should go to and be enjoyed by the children of her body lawfully to be begotten, if she should have any, and their heirs; and in default thereof he limits the same over to his son *William Legg*, and his heirs and assigns for ever. The testator left six children, *John, Robert, William, Marthana, Elizabeth* the plaintiff, and *Anne* — *William Legg* devised his reversion expectant upon the death of *Marthana* to his brother *John* and his heirs, upon trust to sell and divide the money arising therefrom between himself and *Elizabeth*. *William* died in the life-time of *Marthana*. *Marthana* is since dead without issue. The plaintiff *Elizabeth* claims under *William's* will. *Robert*, the grandson and heir at law of the testator and *Marthana*, insists, that the devise to the children of *Marthana* and their heirs was a fee, and that the remainder to *William* was not devisable by him, he having only a contingent interest, and not devisable in the life-time of *Marthana*.

HARDWICKE, Lord Chancellor. The question is, Whether the remainder to *William* is to be considered as *vested* or *void*, or as a *contingent remainder*? And in order to make *William's* devise good, it must be a *vested remainder*. And I think, *Marthana* took no estate-tail; it is given her expressly for life; and therefore no greater estate shall arise by implication: for though a devise "to *A.* and his children," or "to *A.* and after his death to his children," will give *A.* an estate-tail if he has no children, according to *Wild's Case*, 6. Co. yet in this case there are words of contingency, "if he have any children," which differs the case from *Wild's Case*. And there does not appear to have been any intention which would be fulfilled by over-ruling the estate for life.

THE SECOND QUESTION is, What estate the children of *Marthana* would have taken, whether an estate tail or in fee? And to determine that question, the subsequent words, "in default thereof," must be taken into consideration. If no remainder had been limited over, it would certainly have been a contingent remainder in fee to the children of *Marthana*; and so it would have been if *William* was a stranger; but *William* must have been uncle of the children if there had been any living;

(a) The following cases in this volume were kindly communicated to the Editor by CHARLES BUTLER, Esq. of Lincoln's-Inn.

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and therefore, leaving *William* or any of his heirs, the children could not die without heirs; which turns the construction of the word "heirs" into "heirs of their bodies." The doubt arises upon an equivalent sense of the words, "in default thereof," if they shall relate to the children or the heirs of children. If they are to be considered as relative to the children, I admit it would come to the case of *Loddington v. Kime*, 1. *Salk. T.* devises, &c. which is not a fee mounted upon a fee, but a fee with a double aspect, and to arise to the one or the other as the contingency shall happen; and both the remainders are contingent; but that case is anomalous, and to set over a rule of law that one fee cannot be mounted upon another; and such a construction ought never to be made without an absolute necessity, as there was in that case; but in the present case I am not bound to make such a construction. It is insisted for the plaintiff, that the words "in default thereof" relate to the next antecedent word "heirs." And it is insisted for the defendant, that they are to be applied to the more remote correlate children. But I think both the contingencies are too narrow, and that the words take in both the constructions in the present case; and that brings it to the common case, in all marriage-settlements of limitations to the father for life, to his first and every other son in tail, remainder to daughters in tail, and for want of such issue remainder over, where the words "for want of such issue" will take in all the contingencies that can arise upon the precedent limitations, viz. the want of sons or daughters and the issue of sons or daughters; and what weighs more with me is, that it is a rule, first, that where it can be construed a contingent remainder, it shall never be construed an executory devise: and the reason is, because it would put the inheritance into abeyance, which the law dislikes (*a*). Secondly, That a remainder shall never be construed a contingent one, if it can be construed a vested one: and the reason is, because a contingent remainder may be destroyed by the fine or feoffment of the tenant for life; and to construe this a contingent remainder would be putting the whole estate into the power of *Marthana*; and for what? Why to put an heir at law out of the power of an ancestor, and to defeat the express devise. And therefore I think the children of *Marthana* would have taken only an estate-tail, and that the remainder was vested in *William*, and was well devised.

(*a*) *Quare* the reason of this rule, for the inheritance is not in abeyance upon an executory devise, and is in abeyance upon a contingent remainder. Cases cited, Cro. Jac. 415. *Webb v. Herring*, 3. Bulst. 192. 1. Roll. Abr. 830. 2. Leo. 191. 3. Lev. 70. *Parker v. Thacker*. *Morris v. Wootton*, at the Cockpit, 1730. *Goodright v. Pullen*. *Wyld v. Lewis*, 26th April 1738, "I give to my wife;

"and if she has no son nor daughter begotten by me, and for want of such issue, the estate shall return to *John Wyld* and his heirs;" "son and daughter" were held to be words of limitation, and the wife tenant in tail. *Skinner*, 140. 3. Lev. 427. *Wynne v. Jekyl*, Peer. Wms. 1. *Salk.* 224. *Loddington v. Kime*.—NOTE to the original manuscript.

Lloyd *against* Thursby.

Case 155.

FATHER AND SON join in a mortgage of the father's estate. The father receives the money, and the son conveys in consideration of ten shillings. There was no covenant in the mortgage for payment of the money.

In what case real and personal assets shall be liable to mortgagee.

The bill was brought to make both the real and personal assets of the father and son liable to the mortgage-money, the estate mortgaged being subject to prior incumbrances.

HARDWICKE, Lord Chancellor. It has been determined, that the personal assets are liable, though there be no covenant in the deed for payment of the mortgage-money, because there is a debt contracted by the borrowing. But this demand goes a step further, seeking to charge the real assets of the father in the hands of the son which are not liable in the hands of the heir, even by a bond or covenant of his ancestor, unless the heir be specially named. And as to the son, his assets are no way liable, for he conveyed only in consideration of ten shillings, had no part of the money, and consequently no debtor; and neither his real nor personal assets are bound.

Gwyn *against* Hook.

Case 156.

In Chancery, 17 July 1744.

THE TESTATOR *Griffith Daws* having two brothers, *Francis* and *Thomas*, by will devised his estate to his grand-daughter and heir at law *Elizabeth Lady Bulkeley* in the following words: "I give and bequeath all my lands and tenements to my grand-child, the *Lady Bulkeley*, during her natural life; and after her decease, to the right heirs male of me the said *Griffith Daws* for ever;" and died.

S. C. 1. WILK 30.

Lady Bulkeley, upon her marriage with the defendant *Hook*, settled the premises upon herself and her husband for their lives, and the life of the survivor; and after the decease of the survivor, to the use of the defendant, his heirs and assigns, for ever.

Lady Bulkeley died; and upon her death the plaintiffs, who were the grandchildren of *Francis* the testator's next brother, brought their bill against the defendant to be let into possession of these estates under the will of *Griffith Daws*, to whom they were also, by *Lady Bulkeley* dying without issue, become heirs at law.

The point of law having already come in question upon a demurrer on this very will, in the case of *Daws v. Ferrers* (a) (*Lady Bulkeley* having formerly been married to *Ferrers*), THE LORD CHANCELLOR, upon the hearing of the cause, made

(a) 2. Will. 1.

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a case for the opinion of the Judges of the Court of King's Bench, Whether the plaintiffs were intitled to the estates in question by virtue of the will of *Griffith Daws*?

The Judges now certified their opinion in the following words :
 " UPON hearing Counsel on both sides (a), and consideration of
 " this case, WE ARE OF OPINION, that the plaintiffs are not
 " intitled to the estate in question by virtue of the will of the said
 " *Griffith Daws* dated the fourteenth of *November* 1693; for we
 " conceive, that *Francis*, the brother of the testator, under whom
 " the plaintiffs claim, could not take by the description of "right
 " *heir male of the testator*."

HARDWICKE, Lord Chancellor, now declared himself satisfied with the opinion, and dismissed the bill (a).

(a) See the arguments of the Counsel in this case 1. Will. 30.

(b) It was said by the Counsel, and agreed to by THE LORD CHANCELLOR, that this differed from *Brown v. Barkham*,

Precedents in Chan. 442. 461. 2. Vern. 729: the limitation being there to the " heirs male of the body;" and this was said to be the same as *Sterling v. Ettrick*, Precedents in Chan. 54.

Case 157.

Parsons against Parsons.

The case upon the will of Mr. *Alderman Parsons* touching the distribution of his estate as a freeman of London.

UPON THE MARRIAGE of the late *Mr. Alderman Parsons* with the plaintiff his wife, then *Sarah Crowley*, articles were entered into, dated the fourteenth of *April* 1715, between *Mr. Parsons* of the first part, *Sir Robert Nightingale* and *Mr. Crowley* of the second part, and the plaintiff of the third part; whereby (reciting the intended marriage between the plaintiff and *Mr. Parsons*, and that *Mr. Parsons* by his bond bearing even date therewith stood bound to *Mr. Crowley* and *Sir Robert Nightingale* in the penal sum of twenty thousand pounds, subject to a condition for the payment of eleven thousand pounds within six months after the intended marriage, and of eleven thousand pounds which *Mr. Parsons* would have with *Mrs. Crowley* as her marriage-portion) it was covenanted, that the said bond, and the said eleven thousand pounds thereby secured, and the growing interest thereof, should be for the use and benefit of *Mr. Parsons* and his children by *Mrs. Crowley*, in the manner hereinafter mentioned, viz. that if *Mr. Parsons* should pay the eleven thousand pounds according to the condition of the said bond, then it should be lawful for the trustees (by and with the consent of the said *Mr. Parsons* and *Mrs. Crowley*, and the survivor of them) to lay out the said eleven thousand pounds (according to the condition of the said bond), or any part thereof, in the purchase of lands, or place it out at interest in the funds, or other public or private securities, " upon trust, that "*Mr. Parsons* should have and take the rents, interest, and profits thereof for his life; and after his decease, that all the principal money, or the lands or other securities purchased therewith, " should be paid and conveyed to the use and for the portions of all
 " the

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" the daughter or daughters, younger son and sons, at such time
 " and times, and in such shares and proportions, and subject to such
 " provisos and conditions, and in such manner and form, as the
 " said *Mr. Parsons* and *Mrs. Crowley* should, at any time during
 " their joint lives, or of the survivor of them, by any writing under
 " his or their hands and seals, to be subscribed in the presence of
 " three or more credible witnesses, direct, limit, and appoint; and
 " in default of such direction, then equally among all the daughters
 " and younger sons if more than one, but if only one then to that
 " one; and in default of child or children, then to *Mr. Parsons*,
 " his heirs and executors, with a power to trustees either to con-
 " tinue the said eleven thousand pounds upon *Mr. Parsons's* bond,
 " or to call it in and lay it out upon the purchase of lands or other
 " securities." Then comes A PROVISO, "that if *Mr. Parsons*
 " should in his life-time give unto such daughter or daughters, or
 " younger son or sons, any portion or portions, or should leave
 " such child or children any sum or sums of money, lands or tene-
 " ments, goods or chattels, at the time of his decease, then the said
 " portion or portions, or money so given by him or left, and the
 " value of the lands, tenements, goods, and chattels, so to be to him
 " to them or any of them left as aforesaid, should be taken and
 " accounted as part of the portion or portions thereby to them
 " provided, unless he should declare the contrary thereof by any
 " writing, or by his last will and testament." The marriage
 took effect, but the eleven thousand pounds was never paid, but
 continued on *Mr. Parsons's* bond; and he by will in 1725, having
 one son and one daughter only (*Sarah*), directed his wife "to pay
 " his daughter *Sarah* the sum of eleven thousand pounds, at such
 " time and in such manner as he by his marriage-settlement was
 " obliged to pay the same;" and made his son *John* residuary
 legatee, and his wife sole executrix. In 1740 *Mr. Parsons*,
 having then two daughters, *Sarah* and *Anne*, by codicil, reciting his
 will, and that he had since the making of it another daughter born,
 thereby directs his wife to pay, for the use of both his daughters,
Sarah and *Anne*, the said eleven thousand pounds, in such manner
 as by his marriage-settlement he was obliged to pay the same;
 and thereby gave to his said two daughters nine thousand pounds,
 to be equally divided between them, to be paid at their respective
 ages of twenty-one or days of marriage, which should first happen,
 in case his said daughters should marry with the consent of his wife,
 and to be first had in writing under her hand; but in case either of
 his daughters should marry without her consent, that the share of
 the nine thousand pounds so belonging to either of his said daughters
 so marrying should merge and sink into his personal estate for the use
 and benefit of his son *John Parsons*; and in case both his said
 daughters should marry without such consent, that then the whole
 nine thousand pounds should merge and sink into his personal estate
 for his son's benefit. *Mr. Parsons*, being a freeman of *London*,
 died soon after, leaving his son *John* and two daughters. *Sarah*,
 the eldest, married the defendant *Dunne* without her mother's

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consent : whereupon *Mrs. Parsons*, by deed, made an appointment of the eleven thousand pounds under the articles, and appointed five hundred pounds thereof to her daughter *Sarah*, and the remaining ten thousand five hundred pounds to her daughter *Anne*.

And now *Mrs. Parsons*, the widow, brought her bill for an account of and touching the distribution of her husband's estate ; and amongst several other points arising upon the articles, will, and codicil, the following, which were the only material ones, were determined.

HARDWICKE, Lord Chancellor. The first point relates to *Mrs. Dunne's* portion given by the codicil. And this seems very clear, the portions being given only in case the daughters marry with their mother's consent ; and if they marry without consent, the portions are directed to sink into the residue for his son's benefit ; which direction for sinking into the residue was, in the case of *Hervey v. Aston* (a), held by THE TWO CHIEF JUSTICES, MR. JUSTICE COMYNS, and MYSELF, to be equal to, and the same as a devise to a particular person. As to the eleven thousand pounds, there is no doubt of *Mrs. Parsons's* power of appointing it ; but I think, the whole interest thereof must be allowed for the maintenance of the two daughters equally unto the time when the plaintiff made the appointment.

THE NEXT QUESTION is, How the distribution shall be made under the custom of *London* ? The plaintiff, *Mrs. Parsons*, being barred by her marriage-articles from any claim under the custom of *London*, the division must be in moieties ; one to the children, the other to the freeman's part, as it has been often determined ; and this so long since as in *Hall v. Lumley* in 1641 (b), *Hancock v. Hancock* (c), *Clare v. Ashmole* and *Rawlinson* (d). But the question of the greatest consequence is, Whether, in case any of the daughters shall elect to take by the custom, such daughter shall be obliged to bring into hotchpot what she shall take of the eleven thousand pounds ? For though the general rule be, that whatever is received by the child of a freeman in his life-time by way of advancement must be brought into hotchpot, yet there may be an exception ; and it is not every sum a child takes from his father that shall be brought into hotchpot. The provision of the eleven thousand pounds arises from the articles, where the trust is declared, that it should be lawful for the trustees to lay out the eleven thousand pounds, subject to such provisoes and conditions as the survivor of *Mr. Parsons* and his wife should appoint, with a power to the trustees either to call in or continue the bond. Now nothing is more certain, than that what is to be divided or distributed must be taken as things stand at the freeman's death : not but that the

(a) Comy. Rep. 7-6. 2. Eq. Abr. 147. 216. 432. 503. Cases T. T. 212. 1. Atk. 361.

(b) Tothill, 112.

(c) 2. Vern. 665.

(d) Cited 1. Will. 644.

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estate may be increased or diminished ; but the rights are then to be fixed ; and this provision of eleven thousand pounds under the articles was merely contingent at *Mr. Parsons's* death. It might have been appointed at any time during the plaintiff's life, or by her will, and till she had executed her power was a mere contingency ; so that if there was no more in the case it would be exactly that of *Newland v. Shepherd (a)*, heard first by LORD MACCLESFIELD, and then by LORD KING, where the question was, Whether the daughter was fully advanced ? turning only upon a provision of one thousand pounds she was intitled to being liable to a contingency at her father's death. LORD MACCLESFIELD was of opinion it was no advancement, but that she should receive her full third of her father's estate without any bringing into hotchpot, there being no bringing into hotchpot where there was but one child, and no collusion between the child and widow ; which was affirmed by LORD KING. The present case, indeed, was endeavoured to be distinguished from that, as there the question was between one child only and the widow ; but still the substantial point was, Whether a contingent provision, the contingency not happening in the father's life-time, was an advancement ? the point being the same between an only child and the widow and many children and her. And in order to make this the better understood, I will state that case of *Newland v. Shepherd (b)* : A freeman of London had married his only child to *Mr. Newland*, and by her marriage-articles contracted to give her a portion of seven thousand pounds, payable by installments of one thousand pounds a time ; the last of which was to be paid at the end of ten years, if his daughter, or any child of her's, was living at that time ; *Shepherd* died before the expiration of the ten years, but the daughter lived to the end of them ; and the question between her and the widow was, Whether she was fully advanced ? for if she was, she could claim no orphanage part. And the Court referred it to the Master to enquire what was the value of the estate. It was reported to be eighteen thousand pounds, which brought it to a very nice question ; for if the whole seven thousand pounds was considered as an advancement to the daughter, then she was fully advanced, having received her full third : and LORD MACCLESFIELD was of opinion that she was not fully advanced, but should be let into one clear third of the residue, as there can be no hotchpot between a child and the widow, that being only between the children themselves ; and in such case the child comes in for an intire third of what is left : the ground of which opinion was, that this sum of one thousand pounds, which was to be paid at the end of ten years, if the daughter or any child of her's should be then living, depending upon a contingency, was not an advancement at the death of the father. And upon this point the cause was reheard by LORD KING, who was of the same opinion, and affirmed the decree. But another distinction was taken between that case and our's, that

(a) 2. Peer. Wms. 194.

(b) Eq. Cases Abr. 251.

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here the eleven thousand pounds was a debt due in the father's life, which was not so of the one thousand pounds in that of *Newland v. Shepherd*. That it was not due is certain, but that will not alter the children's right, which still remained contingent. There was another case determined on the point by LORD KING, which is stronger than the present, that of *Feast v. Feast*, 5th April 1726 (a), where *Sir Felix Feast*, a freeman of London, upon his marriage, agreed to leave his wife, if she survived him having one or more children, two thousand pounds, his eldest son two thousand pounds, and one thousand pounds a-piece to his younger children; and if his eldest son died before twenty-one, the two thousand pounds to be paid to the next son; and in case any of the younger children died before that age, the one thousand pounds to be equally divided amongst the other younger children. The provision made for the wife was by the articles agreed to be in bar of her dower and claim by the custom of London; but nothing is said as to the children. *Sir Felix Feast* died intestate, leaving a widow and an eldest son, a daughter married and advanced, and two or three younger children. The eldest son insisted, he was intitled to his two thousand pounds in nature of a debt out of his father's personal estate, and also under the custom to an equal share with his brothers, without bringing anything into hotchpot: and decreed by LORD KING, that the two thousand pounds which *Lady Feast* claimed by the marriage-articles, the two thousand pounds claimed by the eldest son, and the one thousand pounds claimed by the younger children, were a debt on the personal estate, and should be paid with interest from the father's death, and the surplus to be divided in moieties, one whereof to go, according to the custom, amongst all the children, and the other according to the statute of Distributions, without any direction for bringing into hotchpot. This was the LORD KING's opinion, who had been recorder of London; and I look upon it as an express authority in point, that this contingent provision in the present case ought not to be brought into hotchpot. There were indeed two cases objected to by the defendant's Counsel: that of *Edwards v. Freeman* (b), and *Townshend v. Townshend*, heard by LORD TALBOT, 3d May 1746 (c): the first of which being upon the statute of Distribution is not strictly *ad idem*; for though it be sometimes said, that the statute was formed upon the plan of the custom of London, yet it was not to be taken so throughout, the custom and statute differing materially in many points, and particularly in that now in question, the statute requiring any estate which the children have by settlement from the intestate to be brought into hotchpot. And upon this it was that THE MASTER OF THE ROLLS' opinion turned; he holding, that the word "*estate*" includes both real and personal; that it was not material whether the advancement was in the father's life or not, it being an estate by settlement, which must be brought into hotchpot. Though this be not in the report of the case by

(a) Eq. Caf. Abr. 250. 253.

(b) 2. Peetr. Wims. 435.

(c)

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Mr. Peere Williams, yet it appears by my notes to have been the principal ground of his opinion. Thus it stands upon the statute, but the custom of *London* relates only to advancements in the father's life-time. That of *Townshend v. Townshend* was indeed upon the custom, but upon a very different reason, and not at all applicable here: A freeman of *London* had covenanted, that if his wife died before him, leaving children by him, that after his death his executors should pay four thousand pounds amongst her children as his wife should direct; the wife died in his life-time, leaving one child only; the husband married again, and had other children: and held by LORD TALBOT, that if this child would claim any further share by the custom, the four thousand pounds must be brought into hotchpot; for the wife being dead, and but one child of the marriage, there was no contingency at the father's death, but the four thousand pounds vested immediately in that child by the death of the mother, and in the father's life-time; so that neither of the cases shake the authority of *Newland v. Shepherd* and *Feast v. Feast*. There are reasons in the present which would determine my judgment in this point. In *Edwards v. Freeman* (a), it was agreed by all the Court, that the contingency on which the provision depends must be so limited as to arise within a reasonable time to warrant the bringing it into hotchpot; whereas in this case it might have waited during the whole life of the mother, who could appoint it by deed in her life-time, or by her will. How then could it be an advancement in the father's life, or at his death, as are the words of the articles, none of the children being then intitled to any certain part? It may be said, that after the mother's death, or when she had made the appointment, the children should refund what they had received out of the orphanage part. But what confusion would this make in the children's share, who could never know for certain the *quantum* thereof without making the distribution of the estate to wait until the mother had made the appointment. There is another stronger reason, which is, that *Mrs. Parsons* may make the appointment subject to such provisos and conditions as she shall think fit; which, though this Court would construe to be such as are reasonable, yet if upon marriage of one of her daughters *Mrs. Parsons* had appointed a particular sum, with conditions, that if such daughter left no issue it should go to the other children, it must have waited, and could not be known whether to be brought into hotchpot till it was known whether she did or did not leave issue. Besides all this, there is another consideration that has great weight with me, which is, that I do not look upon the sum of eleven thousand pounds as part of *Mr. Parsons's* personal estate at the time of his death, but as *Mrs. Parsons's* marriage-portion lent to her husband; and if so, this will go to the rest of all the arguments that have been urged for bringing it into hotchpot. The Court, upon judging upon marriage-articles, considers the intent of the parties more than the words: The portion was eleven

(a) 2. Peer. Wms. 435. 1. Eq. Abr. 249.

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thousand pounds; *Mr. Parsons*, in consideration thereof, gave bond to pay to the trustees, to whom a power is reserved of continuing the money upon that bond if they thought proper, the main intent being to secure this sum for the younger children's portions. Had the trustees not left this money in *Mr. Parsons's* hands, he could not have made use of it in his trade; and therefore this method was taken of lending it to *Mr. Parsons*, still reserving a power to them to call it in when they thought fit: and what makes me not to consider it as part of *Mr. Parsons's* estate is, that had the trustees called it in, and placed it out at interest, and paid *Mr. Parsons* the interest during his life, it would never have been called part of his personal estate, and consequently not liable to be brought into hotchpot. Upon the whole of the matter, I am not at all doubtful in this point, else I should have sent it to be certified by the recorder; but being clear, I will not put the parties to the expence and delay with which that method would be attended.

THE NEXT QUESTION arises upon the proviso in the articles, that if *Mr. Parsons* should give or leave such younger children any portion or sum, that such portion or sum so given or left should be accounted part of the portion thereby provided, Whether the orphanage share of such daughter as shall elect to take by the custom is to go in satisfaction of the eleven thousand pounds or any part thereof? And I think it shall not: The word "*leave*" may, indeed, include a provision to come by act of law, but in the present case it is confined to leaving by a voluntary act; and the subsequent words, unless he should declare the contrary by any writing, plainly shew the parties meant such a leaving as the father might direct to go in part of satisfaction. The antecedent right which the children have to their orphanage share under the custom against any disposition of the father distinguishes this case from that of *Blandy v. Widmore* (a), where the husband left to descend or be distributed what he might have disposed of otherwise, which was therefore construed a satisfaction. But there is still a material reason against this being a satisfaction, which is, that the children's orphanage share is liable to other contingencies than their share of the eleven thousand pounds: the orphanage share of such as die under twenty-one goes over to the survivors; but in the present case, *Mr. Parsons* may limit eleven thousand pounds upon quite different contingencies. And in the case of *Savile v. Savile* (b) it was held, that an estate which goes in satisfaction of another ought, from the nature of the thing, to have the same qualities with that which it is intended to come in the place of; and it signifies nothing to say, that the contingencies have not happened, for it is enough that they might have happened.

(a) 2. Vern. 709.

(b) 1, Chanc. Rep. 79.

Ex parte Winchester.

Case 158.

JOHN GRANT, previous to the marriage between the petitioner and his daughter, by bond, dated the second of *July 1739*, became bound to the petitioner by the penal sum of two thousand pounds, conditioned as follows: "That if the marriage take effect, and if the heirs, executors, or administrators, of *John Grant* should, at the expiration of twelve months after the death of the survivor of the said *John Grant* and *Barbara* his wife, pay or cause to be paid unto the petitioner, his executors, administrators, or assigns, the sum of one thousand pounds; AND ALSO, if the said *John Grant*, his heirs, &c. should, until the one thousand pounds became due and be paid, well and truly pay unto the petitioner, his executors, administrators, or assigns, interest for the same after the rate of four *per cent.* by equal half-yearly payments on *Christmas-Day* and *Midsummer-Day* in every year, the first payment to be made at the *Christmas-Day* then next ensuing, that then, &c." By articles bearing even date with the bond this money was to be laid out at interest, and the interest to be paid to the husband for life, then to the wife, and then the principal to be divided amongst his children as therein mentioned. *John Grant* the father paid all the interest up to *Christmas-Day* last, but none of the payments were made precisely upon the day they became due, but some days after. Before *Midsummer*, no interest being due on the bond, the father became a bankrupt.

In what case a husband shall be allowed to prove the money settled on his wife under a commission of bankruptcy against her father.

And now the petitioner *Winchester* prayed to be admitted a creditor under the commission for the one thousand pounds so secured.

IT WAS ARGUED for the assignees, that no action could be brought upon this bond at the time of the bankruptcy, and therefore it was no debt; and that the interest accrued due on *Midsummer*, since the bankruptcy, could not intitle the petitioner to be let in. And to shew that no action could be brought upon this bond it was argued, that though an action lay at common law upon non-payment of the money at the day in the condition, even though it was paid at a day after, yet that now by 4. & 5. *Anne*, c. 16. s. 12. money paid after the day might be pleaded in bar as well as at the day, provided it was paid before the action brought: so that this case is within the act; and consequently as no action could be brought, no debt was due.

HARDWICKE, *Lord Chancellor*. It is to be wished some rule was settled by act of parliament for these kind of cases as well as for those that fall within the 7. *Geo. 2.*; for as the law now stands, they turn upon nice legal distinctions no way relative to the real merits of the cause. I shall take this case and the foregoing one of *Groome* together, and must give different judgments on them. Upon such distinctions variety of causes of this sort have come before the Court; some wherein there has been a covenant with

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trustees by the husband to pay money immediately to be placed out at interest upon future and contingent trusts; others where a future and contingent payment is to be made, and a judgment given in a penal sum to secure it. In the first of these cases, if the husband becomes a bankrupt after the time the money is by the covenant payable to the trustees, and before it is due on the future trusts, the trustees are to be admitted as creditors; and the Court will do equity upon the covenant. So in the second instance, of a judgment at law, they are admitted creditors (though there be a contingent defeasance); because in both these cases the covenant might in the one be sued at law as broken, and execution on the judgment be taken out immediately on the other. But where the security is by bond, the question has always turned upon this, Whether the bond was forfeited at law? for if so, the assignees can only be relieved upon the equitable terms against the penalty. Now in this of *Winchester's* it is admitted, there was a breach before the bankruptcy by non-payment of the interest at the days in the condition; and the question is, If this be such a breach as will support an action? which depends on the statute for Amendment of the Law. Before the act, it was clearly a breach of the condition, notwithstanding the subsequent acceptance; but a new plea is given by that statute, *viz.* payment before the action brought. The bonds described by the act are bonds payable at a certain day and place; this is a bond payable, as to the interest at several days, and as to the principal sum at a day future and uncertain. It is not therefore within the words of the act, nor is it within the intent; for it is unreasonable to allow such a plea to these bonds, where the penalty to be recovered is a security; for though nothing is due, yet it is fit the obligee should be at liberty to get judgment on the penalty for his security; and if he does, courts at law will exercise an equitable jurisdiction by not suffering execution to be taken out without just cause; and this they did before the statute; they will stay execution on payment of what is due; and the judgment to stand as a security. If therefore this be not within the statute, the penalty might have been recovered at law before the bankruptcy; and if so, this Court will relieve the assignees only upon equity being done according to the condition.

As to the petition *Ex parte Groome (a)*, I think the case not within the statutes of bankruptcy, nor can the petitioner be admitted a creditor, for no action could have been brought, nor was any debt due before the bankruptcy. Then the question is, Whether the petitioner can be let in, the contingency happening during the bankruptcy, and before the second dividend? In the case cited of *Cazolet*, the contingency had not happened, and the petitioner was refused; but it was there said, by LORD KING, that if the contingency happened before the second dividend made, the creditor should be admitted. Now that was an *obiter* saying of his own upon a point not in judgment before him. It was doubted by LORD

(a) 2. Atk. 115.

TALBOT; and upon consideration I AM OF OPINION, the petitioner cannot be let in. The point depends on the act about Certificates, 5. Geo. 1. it being a general rule, that the creditor's privilege to come in under the commission, and the bankrupt's privilege to be discharged of the debt by certificate, are co-extensive; and it is extremely just they should be so. Now by the 5. Geo. 1. the bankrupt cannot be discharged by certificate from this debt, because the act says, "debts due and owing at the time of the bankruptcy;" and other clauses of the statute shew its general intent and provision to relate to debts owing then only, as that relating to mutual creditors only, &c. And within that clause, this could not be set off against a present debt due to the bankrupt; and indeed the penning of all the clauses shews the statute extends only to debts due before the bankruptcy. Now this was not so, and consequently not discharged by the certificate. And the 7. Geo. 1. has a particular clause, where future debts are let in for discharge of bankrupts in those particular cases. The case of *Tully v. Sparks* is a clear authority in point against the petition. And the general rule is as I have already mentioned, which I rely upon; if that rule was not to prevail, it would be a great hardship both on the bankrupt and the other creditors, for such a creditor as this would have a double remedy; he might come in as creditor for part, and might bring an action too after the certificate for the residue: and the certificate could not be pleaded against him as a discharge, as it might against creditors whose debts became due before the commission. Therefore this petition must be dismissed.

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But in that of *Winchester*, I order the petitioner to be admitted a creditor for principal and interest on the dividend he shall receive, to be laid out according to the articles.

Bailey against Wilson.

Case 159.

At the Seals before Hilary Term, in Chancery, 1744, 18. Geo. 2.

ON A PETITION for a commission of review upon sentence of the court of delegates here, confirming a will made in *Ireland*, which was contested for divers reasons, an objection was made for reading the evidence of *Mr. Magill* in favour of the will, as to which the case stood thus:

Evidence, in what cases allowed to be read in chancery in favour of a will.

The testator had given several specific legacies of a watch, plate, &c. to different persons, and appointed the defendant *Wilson* executor. It appeared in proof in the cause, that *Wilson*, immediately after the testator's death, sent for *Magill* and several others to whom these specific legacies were given; that *Magill*, in *Wilson*'s presence, took the things so bequeathed and gave them to the legatees without *Wilson*'s hindering it, though *Wilson* did say there was time enough to do it, and that it was too early; but *Magill* declared, that the testator had devised it, and that he should see them distributed.

S. C. 5. Bro.
P. C. 383.

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The objection to *Magill's* evidence was, that by this act he had made himself executor *de son tort*, and was therefore interested in the event of the cause; because if this was not a good will, the persons to whom administration should be granted would have an action against him as a trespasser, and in trover would recover damages against him.

To which IT WAS ANSWERED for the defendant, that *Magill* was interested on both sides, for he was liable to have an action brought against him by *Wilson* the executor; and though a man should be finally interested in the event of a cause, if he be not principally interested, his being consequently so will not go to his competency, though it may to his credit. Thus, if an estate be left to *A.* for life, and after to the parishioners of *B.* the parishioners shall be competent witnesses, because every man who so gives evidence may die before this remainder comes into possession. So the heir at law may give evidence for his ancestor, because his ancestor may dispose of his estate otherwise than to him; and cited *East India Company v. Goslin*, in the king's bench, about two or three years ago; where, at the trial, the sailors who had forsaken the ship, as well as the captain, were refused, upon a presumption that if they had not done their duty they were chargeable; but upon motion for a new trial it was granted, because they not being principally but only consequently and without certainty interested in the cause, were not incompetent witnesses, but their credit must be left to the jury. There was also cited *The King v. Bray*, before this Chancellor when Chief Justice, which was upon an information relating to the borough of *Tentagen*, where it was held, that the mayor of the corporation was no incompetent witness to give evidence of a custom as to what he did when he was mayor.

MR. ATTORNEY-GENERAL replied, FIRST, That the executor of this will could not maintain an action for these goods against *Magill*. SECONDLY, Supposing he could, yet he could not recover such damages against him as the administrator would in case this will was made void. As to the first, Where there is a lawful executor, he only has a right to bring trover against an executor *de son tort*, but it is under consideration of the jury how far the action is maintainable, and what damages shall be given; and therefore in case of debts paid by an executor *de son tort*, he cannot plead that he has paid the debts, but shall give it in evidence, and shall be recoupled in damages in an assise brought against him by the disseisee. 5. Co. 30. Carth. 104. Skin. 274. And this, not because the payment was originally a good one, but that justice may be finally done to both parties; and at the same time he is punished for meddling with what did not belong to him; he may not be obliged to pay twice the same sum: but in the present case no such action can lie, for a man cannot bring an action for an act done by his consent; the legacies were paid with the executor's privity; and his not hindering it must be taken for a consent. Suppose the lawful executor had brought an action against the legatces

legatees (for he has right, if the property remains in him to bring an action for the goods wherever they are), could there have been a verdict for the executor? No, certainly; the legacies are given, and ought to be paid; and though the executor's assent be necessary, yet it is not from that assent the legatee derives his right, but from the will: the assent of the executor only completes the right; and therefore the least thing will serve to prove it, where the executor cannot be injured by it (and even where he can, if it be shewn it is sufficient); and here is no want of assents. Now if he cannot recover against the legatees, neither can he against the executor *de son tort*, for he can recover against him only upon the foundation of the property remaining in him, which is the foundation of the action against the legatee. But, secondly, Suppose the action did lie, there is no ground for putting the two interests upon a level; there being such a difference of what one and the other should recover, in the one case the whole would be recovered, in the other but an inconsiderable trifle; and it is this difference of interest that will prevent him from being impartial. Now what would the lawful executor recover against the executor *de son tort*? It was said, that the Court cannot consider what a jury would do, but only what the law gives. But what are damages? Are they not what a jury must enquire into, and contain the prejudice which the plaintiff on demand hath suffered? In an action of trover, nothing is recovered but damages; and the Court must direct the jury that what they think the plaintiff has suffered, is the question: and what damages has he suffered here? None. It is to prevent circuitry (which a court of law always does where there is not a necessity, as where the action is not brought for a special thing) that he shall recover next to nothing. Suppose the rightful executor should bring a bill here against the executor *de son tort*, Would the Court oblige him to pay over again what he had once paid? No. An executor *de son tort* shall be allowed all payments which the rightful executor ought to have made (*Chan. Ca. 33. 126.*), and so justice is done on both sides. How then can he be said a disinterested witness, since the reason for rejecting evidence is the bias of mind arising from the interest the witness has in the event? In the case of *The East-India Company v. Gossin*, the sailors were admitted from a necessity of the thing; and besides the duty of the captain and the men were different; it was their duty to obey him; and while they did so, their bonds to him could not be forfeited. So where a goldsmith's servant is admitted to swear to an account, it is for the sake of necessity.

HARDWICKE, *Lord Chancellor*. The question is, Whether the objection to *Mr. Magill's* evidence goes to his own competency or only to his credit? And I am of opinion it goes only to his credit, and not his competency. In order to determine the question, I shall consider this fact in two lights: FIRST, How the point stands, supposing *Mr. Magill* to have acted as executor of his own wrong: SECONDLY, As acting with the privity of the executor named in the will. As to the first: Before probate

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of the will, he delivers part of the testator's goods to persons named legatees in the will. It is said, that if the will be not valid, he is liable to make satisfaction to the administrator for the conversion of these goods. To which it is answered, he is liable either way; and the possibility of an action against him by the executor being weighed against the other, sets off the matter at large. There are many cases where if a witness is liable to account either way, he shall be examined; which answers the objection in respect of his competence: and this objection of a man's being liable to an action differs from his immediately being interested. There has been some change in the doctrine on these points, there being cases in the old Books where a man's being liable to an action went to his competency: but there is a great difference to be made between having an immediate interest and a possibility: as in the case of tenant in tail, with remainder over, in an action brought against the tenant in tail the remainder-man cannot be a witness, though an heir at law might, as having nothing vested in him; but the remainder-man has a vested interest, which the law considers as part of the same fee; and therefore the supporting the tenant in tail's interest is the supporting his own. Now these vested interests are very different from a possibility of action; for suppose an action of trespass brought for a nuisance, and the question is, Whether the defendant worked upon the plaintiff's soil? the action may be brought against the principal alone, or the workmen may be joined as defendants with him; but if they are not joined, they may be brought as witnesses; and yet they are liable to have an action of trespass brought against them; and their confession may be evidence against themselves; but the Court says, that may go to their credit, not to their competency; and the reason of allowing them is, that truth may the better come out. There was a case mentioned of *The King v. Bray*, before me when Chief Justice of the King's Bench, which was upon an information relating to the borough of *Tentzen* upon the nomination of electors who are to return the jury. At the trial, the mayor was called to prove the custom; and objected, that he was the mayor that acted, and was now brought to establish his own act, in which, if he had done wrong, he was liable to be punished; and **BARON THOMPSON**, who tried the cause, allowed the objection: but upon a motion for a new trial, the court of king's bench was of opinion, that the objection went only to his credit, not to his competency. A new trial was granted. In the argument of that case several others were put, particularly *The King v. Clark*, where, upon an information for a nuisance in the river of *Thames*, a person who had received a particular injury and damage by it was produced as an evidence, and objected to, because he might bring his action on the case and recover damages, and so would swear under a bias; but the Court held, this went only to his credit, not to his competency.

This being the general rule as to points of this nature, let us now consider the answer, that *Magill* is liable to an action either way. It is admitted, this would be sufficient if the damages to be recovered

recovered against him were equal ; which is not the case here, for the lawful executor can recover no damages without deducting what has been rightfully paid according to the will. I never knew, in any case where this answer was given, the Court enter into the consideration what might be the *quantum* of the damage. There is always a difference in the damages. Perhaps no action may be brought, or the witnesses may be favoured by the party he supports ; still if there be an equality, by an action on each side, the Court will not enter into the consideration of the damages : and it would be going too far now to enter into it in order to determine whether this objection goes to a man's competency who is in the nature of an executor of his own wrong (as to the abatement in damages nothing is said of it in *Read's Case*, 5. Co. 33. b.) : he is liable to an action by the creditors, and to an action of trover by the executor as a wrongdoer. Indeed, in *Carth.* 104. it is mentioned by LORD HOLT, that in trover brought by a rightful executor after probate against a man acting as executor of his wrong, he cannot plead payment of his debts, but shall give it in evidence, that the plaintiff may not recover the whole against him. This amounts to no more but that he may give it in evidence in mitigation of damages ; and he can plead nothing but not guilty, and cannot set himself up as executor, because he will be answered, that the plaintiff is executor, and has a probate. But nothing is said in that case touching this point by the other Judges ; and the judgment was given against HOLT's opinion. It is laid down somewhat differently in *The Office of Executors*, which is a book of good authority : If an executor *de son tort* pays debts, this payment is good ; and if the payment be out of his own goods, he may retain ; yet that must be understood with this difference, that the payment shall stand as against creditors, but not against a rightful executor, for then any stranger might usurp and take from him the liberty which the law gives him of preferring one creditor to another, nay of preferring himself to other creditors in equal degree with himself ; and therefore upon an action brought by a rightful executor against an executor *de son tort*, if the value of the estate appears clearly, and that the debts were good debts, the Court would direct the jury to deduct this in damages ; but if there be a doubt about it, the rightful executor should not in this action be put to account for the value of the assets : and it would be wrong to suffer a man who is a trespasser to enter into it, but leave him to recover as he can. There cannot, therefore, be any certain rule, and it cannot be said what damages shall be recovered. Now what appears in the present case ? What was the *quantum* of the assets ? What were the debts ? Whether the legatees ought to have their legacies ? How then can it be ascertained that he is liable to more loss one way than another ? It is therefore a good answer to say, there is an equality of action, which way soever this be determined. There is a great difference between an exception to a witness and a challenge to a juror. A juror must stand indifferent before he is sworn ; and therefore an objection to a jurymen need not be so strong

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strong as that to a witness, for an exception to his credit goes to his competency, both being blended together; but it is otherwise in witnesses, who though their credit be weak are still admitted, that all the light possible may be had. This was the fact in *The East-India Company v. Goslin*, the question being, Whether sailors who had given bonds to the master and had deserted the ship could be examined to prove the ship was not forsaken without cause? and as they had no interest in that particular action, the Court thought the objection went to their credit, not to their competency. And of late courts have borne towards allowing such objections only to the credit of witnesses. SECONDLY, If *Magill* be considered as acting with the privity of *Wilson*, this makes his evidence receivable here without dispute. Now *Wilson's* account amounts to this: That after the testator's death he sent for *Magill*; that there came several friends, and particularly the legatees, whom *Magill* proposed delivering their legacies to, saying, the testator had desired him to see their's delivered; that upon *Wilson's* saying he thought it too early to deliver out effects, *Magill* replied, "The testator desired it;" and he did accordingly deliver them in *Wilson's* presence, who does not say that he objected to it. Is not this sufficient to make it *Wilson's* own act? for an executor may before probate dispose of the estate; and if a disposition in consequence of the will be made by another with the privity of the executor, it is done by his consent, and that person is no more than his agent. Will it therefore be an objection to a witness, that an executor has employed him as his agent? And yet in such case the man is liable, if the will is set aside; but it never was thought, that because a witness to a will was employed in the management of the estate, and distributor of the effects, that should take away his competency; and the consideration of actions to be brought against him hereafter is too remote. Taking the case in this light, which is the right one, the objection will not go to *Magill's* competency, for any man who has meddled even for a moment will be liable, as a trespasser, to be sued by the administrator; but this is too remote a consideration. I AM THEREFORE OF OPINION, *Mr. Magill's* evidence should be read.

Case 160.

Bland against Bland.

February 20, 1745.

A devise of lands
for ever conveys
an estate in fee,
and is not affect-
ed by subsequent
words request-
ing the devisee,
"in case of fai-
lure of issue
of his said body,"
to give the estate to another.

DAME BLAND devised her estate to her son *Sir J. Bland*, his heirs, executors, administrators, and assigns, for ever, and did thereby earnestly request her said son, that in case of failure of issue of his said body he would give the estate, or so much thereof as he would stand seised of at his death; by his will or otherwise, to the testator's daughter. After her death, *Sir John Bland* made his will, and gave this estate to another person, contrary to the request.

One

One of the points insisted upon in the cause was, that the devise in the will of *Lady Bland* was a devise in fee, and no way restrained by the subsequent request to dispose of it in such and such a manner.

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HARDWICKE, Lord Chancellor. This case comes before the Court on two bills brought for several purposes. The end of the original bill is to have the direction of the Court touching the rents and profits of *Sir J. Bland's* estate, and to have his will carried into execution. The cross-bill is for raising two portions of two thousand pounds and one thousand pounds. This will is not easy to explain. The first question arises on the manor of *Widdington*, in *Lancashire*, which were the real estates of *Lady Bland*, and subject to her devise with a charge of portions. And the question is, Whether he had an absolute power to devise? And at law there is no question of this, for the estate is to him and his heirs, and therefore vested in him in fee. But the point contended for is, What estate he had in equity? Whether in fee, in tail, or for life? and the doubt arises upon the earnest request to settle the estate.

It is urged on the side of the defendant, that this request is a direction to settle the estate as is therein mentioned, and is imperative, the same as if she had devised in such manner; and therefore in equity he is no more than a trustee to limit this estate to the uses therein mentioned. And for that purpose it is insisted, that any desire in a will is equal to a devise, because a will is no more than a declaration of the testator what he will have done after his death; and if this be sufficiently declared, it must take place; but a person in his will must *velle* not only *petere et rogare*. And whether such expressions are declarations of the testator's absolute will and pleasure, or only a request to be granted or refused, depends upon the circumstances of the case. There are many cases where expressions of this kind are considered as directions. In *Mason v. Emery* the words were, "I desire him at his death to give;" in *Massey v. Sherman*, "hoping, and not doubting, and being well satisfied, "and putting a trust and confidence in her, that she will dispose." There could be no question but that this was a *direction* how to act; the words "trust and confidence" shewed that nothing was left to her but the choice whether she would give it among all or to some only.

The question here therefore is, Whether the words of the testatrix are imperative? And it is plain they are not so; there is no request to settle the whole lands, or any particular part, but a power is left in him to dispose of, sell, or give away, the whole estate in his life, and only so much as he should stand seised of at his death she requests he should settle. That is as much as if she had said, "I leave it to you to dispose of as you think fit, but I should be glad you would give as much as you can spare so and so."

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Sir John might have sold this, or settled it for the advancement of a son or daughter.

It is objected, the circumstances of the estate occasioned these words; the estate was subject to her and her husband's debts, therefore he must have a power to sell; and it is as much as if she had said, he should settle so much as remained unsold after all the debts paid: but no such construction can be made, for what she says is, "at the time of his death." And this has no connection with payment of debts and legacies. And this is very near the case of *The Attorney-General v. Hall*, 1735, which was heard with the assistance of SIR JOSEPH JEKYLL and Lord Chief Baron REYNOLDS: *Thomas Hall* by will gave all the rest and residue of his personal estate to his own son *Francis* and the heirs of his body; but in case his son should depart this life leaving no heirs of his body living, then "I give so much as he shall be possessed of at the time of his death to the corporation of *Goldsmiths*," upon trust for several charities. Bill was brought by THE ATTORNEY-GENERAL to have this estate applied in charities upon the contingencies which had happened. But it was held, that this contingency did not take place; and SIR JOSEPH JEKYLL and THE LORD CHIEF BARON founded their opinion on the words "so much thereof as he shall be possessed of at the time of his death;" otherwise the contingency would not have been too remote, because confined to the time of his death; but here was a power or property left in him to dispose; and the testator had given nothing over but what he should be possessed of at the time of his death. This shewed he intended his son should have the clear property of it, and therefore the devise over was void. It is objected, that this is a power given to him to dispose during his life; and though he held this estate for life or in tail only, there might be such a power given him for a particular purpose. But this would not answer the will, for she has given him a fee-simple, and no power is given but what flows from his estate. She takes it for granted, from his having the fee, that he could sell and dispose of it as he pleased, and therefore she requests; and by the whole penning this request is subject to his direction. I do not lay it down, that in a will a request may not amount to a legacy, but it should be limited to some certain thing, or for some certain part of a thing, and not left absolutely to the pleasure of the person to whom the request is made.

Cafe 161.

Ellinor against Garton and Others.

The court of chancery will not order a devise of land to make satisfaction to the heir for monies laid out by the testator, on a notion that he was possessed of an estate in fee.

JOHN ELLINOR, on his marriage, settled the lands in question on himself and his wife for their lives; remainder to the heirs of their two bodies; remainder to the right heirs of *John Ellinor*. In this deed, *Ellinor* covenanted with the trustees in the usual manner that he had a good title, and that the estate was free from incumbrances. There was no issue of the marriage; the wife died;

John

John Ellinor devised the premises to one of the defendants, and died. His heir at law, the plaintiff, deriving his title under the marriage-settlement, entered. Then it appeared, that *John Ellinor's* father made a will, and devised the premises to his son *John* in tail remainder; so that upon his death without issue the remainder took effect in *A. B.* a defendant, who brought his ejectment, and obtained a verdict at *York* assizes.

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The bill was filed, FIRST, To dispute the verdict at law. SECONDLY, To demand a satisfaction out of the personal assets of *John Ellinor*, on the foundation of the covenant in the marriage-settlement that *Ellinor* had a good title, &c. THIRDLY, That a satisfaction might also be made by the defendant, who claimed under the will, for the money which *Ellinor* had laid out in building upon the premises under the notion of his leaving an estate in fee.

THE ATTORNEY-GENERAL and MR. NOEL gave up the first and third points, and insisted only on the satisfaction out of the personal assets on account of the breach of the covenants; and said, this case was like those of *Kettleby v. Atwood* (a) and *Lechmere v. Lechmere* (b).

HARDWICKE, Lord Chancellor. The first and second points are very properly relinquished. If there was anything wrong in law or in fact at the trial, the party might have had his remedy by a bill of exceptions, or by moving for a new trial. So as to the other point: If tenant in tail would be weak enough to lay out money on the lands intailed, there can be no pretence that any allowance should be made for this.

SECONDLY, In this consideration of the case, it is widely different from those to which it is compared; for in the case of *Lechmere v. Lechmere*, &c. there is an express covenant to settle lands; and there is no doubt that where a person, for a valuable consideration, covenants to make a settlement upon the issue of the marriage, and to limit a remainder to his own right heirs, if all the issue of the marriage die, the Court will decree a satisfaction to the heir at law, notwithstanding he is a volunteer; for what is regarded in equity in cases of this nature, is the intention of the person making the covenant; which appears to be, that so much of his personal estate should be applied in the purchase of lands for the uses in the covenant: so that the question being between the heir at law, who claims under the covenant, and the personal representatives, the Court is certainly right in decreeing, that they both shall have just as much as was intended for them; the one not taking so large a share of the personal estate as he must take if the covenant was not performed; the other having no greater benefit by a satisfaction out of the personal estate than the covenantor intended he should have, if a proportionate part of it had been applied towards the purchase of lands. And so far is the intention of the party regarded in these cases, that if it appear that a covenantor meant to prefer his personal

(a) 1. Eq. Abr. 273. 2. Chan. Rep. 404. 1. Vernon, 298. 471.

(b) 2. Eq. Abr. 31. 501. Cases T. T. 83. 3. Peet. Wms. 211.

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representative to his heir at law, the latter shall have no satisfaction out of the personal assets; nay, the Court goes so far as to admit parol evidence to shew the intention.

But this cause comes before the Court in a strange perplexed manner: the devisee and the heir at law are both parties to the suit. Now if a man who has no title should devise his estate, Is the devisee intitled? Surely not. Is then the heir at law capable of having satisfaction made to him in this case, contrary to the testator's intent? Shall satisfaction be decreed to him, and he be made a trustee for the devisee? This would be the wildest notion in the world.

Let the bill, therefore, be dismissed without costs. But if the plaintiff gives the defendants any further trouble concerning the premises, the defendants have leave to apply to the Court for costs.

Case 162.

Pagget against Gee.

Lincoln's-Inn-Hall, December 4, 1753.

If tenant in tail make a lease, and dies without issue before the rent becomes due, the rent in arrears at the time of his death shall, by virtue of the 11. Geo. 2. c. 19. be apportioned between the personal representative of the tenant in tail and the remainder-man in fee.

ATENANT IN TAIL, with remainder to defendant in fee, leased for years, and died without issue a week before the payment of the half-year's rent. The lessee at the day paid all the half-year's rent to the defendant. The executor of the tenant in tail brought his bill for apportionment of the rent.

HARDWICKE, Lord Chancellor. This point has never been determined, but this is so strong a case that I shall make it a precedent. There are in it two grounds for relief in equity: The first arises on the statute 11. Geo. 2. c. 19. s. 15.; the second on the tenant's having submitted to pay the rent to the defendant.

FIRST, The relief arising upon the statute is either from the strict legal construction, or in equity founded upon the reason of it.

To consider what the mischief was before the act, and what remedy is provided at common law. If tenant for life, or any who had a determinable estate, died but a day before the rent reserved on a lease of his became due, the rent was lost, for no one was intitled to recover it: his representative could not, because he could only bring an action for the use and occupation, and that would not lie where there was a lease, but debt or covenant; nor could the remainder-man, because it did not accrue in his time. Now this act appoints the apportioning the rent, and gives the remedy; but there are two descriptions of persons to whose executors the remedies are given. In the preamble, it is one having only an estate for life; in the enacting part, it is tenant for life. Now tenant in tail comes expressly within the mischief. And I do not know how judges at common law would construe this act, but I should be inclined in this court to extend it to them; I should make

S. C. Amb. 198.
1. Peer. Wms.
392.
3. Peer. Wms.
234.
2. Bl. Rep.
1016.

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make no doubt, were this the case of a tenant in tail after possibility of issue extinct, for he is considered in many respects as tenant for life only; he cannot suffer a recovery, he may be enjoined from committing waste such as hurts the inheritance, as selling timber, though not from committing common waste, being considered as to that as tenant in tail. Was it the case of tenant for years determinable upon lives, he must certainly be excluded within the act, though it says only tenant for life. It would be playing with the words to say otherwise. These cases shew the necessity of construing this act beyond the words of it. Tenant in tail has certainly a larger estate than a mere tenant for life, for he has the inheritance in him, and may, when he pleases, turn it into a fee; but if he do not, at the instant of his death he has but an interest for his life. Such too is the case of a wife tenant in tail *ex provisione mariti*. I give no absolute opinion upon the point.

As to the equity arising from this statute, I know no better rule than this, *Equitas sequitur legem*. Where equity finds a rule of law agreeable to conscience; it pursues the sense of it to analogous cases. If it does so as to maxims of the common law, why not as to the reason of acts of parliament? May, it has actually done so on the statute of Forcible Entries, upon which this Court grounds bills; not only to remove the force, but to quiet the possession. That act requires a legal estate in the possessor; this Court extends the reason to equitable interests.

But I ground my opinion in this case on the tenant's having submitted to pay the rent; he has held himself bound in conscience to pay it for the use and occupation of the land; the last half-year he paid it to the defendant, which he was not bound to do in law; and in such a case, the person he pays it to shall be accountable, and considered as receiving it for those who are in equity intitled to it. The division must be that prescribed by the statute; and then the plaintiff is entitled to such a proportion of the rent as accrued during the testator's life.

AND THEREFORE I DECREE the defendant to pay him such share; and if they disagree, let it be referred to the Master to settle it, and each party to pay his own costs till this time, reserving the consideration of what may be afterwards incurred,

Pullen against Lord Middleton.

Case 163.

Lincoln's-Inn-Hall, March 15.

THE CASE, as to the principal point, was to this effect: Copyhold.

An estate was limited to trustees to the use of A. and the heirs of her body. She married B. These lands were copyhold, and held of the manor of C. and by the custom they were not capable of being intailed, and no recovery could be suffered of them. The husband and wife, by indenture of bargain and sale to lead the uses of a common recovery, declared, that the lands should be to the

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use of the husband and his heirs ; and afterwards suffered a common recovery in the court of common pleas.

The question was, What effect the recovery had upon these copyhold lands ?

HARDWICKE, *Lord Chancellor*. Though by the customs of several manors copyhold estates cannot be intailed, yet they are capable of such limitations as may make them fee-simple conditional ; and it will make no difference that she is not seised of the legal estate, for the trust estate of a copyhold can in no case be capable of an intail where the legal estate is not, it being necessary that there should be the same rule concerning property in law and equity, though as to the manner of conveying estates some difference may be made. A court of equity will in many cases dispense with the ordinary forms in passing estates, but never introduce any rules that may vary the nature of them at common law. The wife, therefore, being tenant of a fee-simple conditional, had power to dispose of it by surrender after the condition was performed, *i. e.* after issue. If the estate had been intailed, it would have been necessary to have barred the intail by some proper means, either by a recovery suffered in the lord's court, if the custom of the manor had admitted of it, or by a surrender. And though the intail had not been of the legal, but of the trust estate, all possible endeavours ought to have been used to have barred it in the ordinary way ; and the rules of the common law in regard to the barring of such estate-tail ought to have been pursued as near as possible, according to the case of *Otway v. Hutton (a)*, where in the case of a tenant in tail of a copyhold estate with a remainder over, the trustees refused to surrender the estate to him, and he brought his bill to compel them, and pending that suit he went to the lord's court and offered to surrender, but was refused, not having the legal estate ; and thereupon he made his will, and devised his estate to his wife and children ; the Court conceived the will sufficient to bar the intail of a trust, he having done all he could, and decreed the estate to go according to the will. But a recovery suffered in the court of common pleas would not have barred such a trust estate-tail as this in the principal case, supposing it to be an estate-tail, unless the trustees had refused to surrender, &c. But taking this estate to be a fee-simple conditional at common law in trust for the wife, as it really is, after the condition performed she might have devised it, had she been sole, by will, which would have operated as a good appointment of the trust ; being a *feme covert*, she has joined with her husband in and executed a deed to make a tenant to the *præcipe*, and suffered a common recovery in the common pleas together with him, the uses of which have been declared to be to the husband and his heirs. Now it is certain, that a *feme covert* may, by a common recovery, convey her fee-simple land, as well as bar an estate-tail ; for she being secretly examined before the recovery is

(a) 2. Vern. 585.

suffered,

suffered, she is as effectually barred as she would be in the case of a fine. But besides this deed and recovery, the husband and wife have gone further; they have brought their bill in this court against the trustees to convey the legal estate, and a decree has been made for that purpose, which I am to suppose has been carried into execution: so that all has been done that could be done to transfer the estate to the husband. And I AM OF OPINION that it is well transferred; and I do not see how this differs from the devise of a trust copyhold estate, which has always been held good.

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against
LORD
MIDDLETON.

Wilkes and Others against Holmes.

Case 164.

In Chancery, Easter Term, 25. Geo. 2. 1752.

IN A MARRIAGE-SETTLEMENT, after a limitation to the issue of the marriage, and of a jointure to the wife, a power was given to the husband and wife to raise two thousand pounds out of certain lands therein mentioned; and if no part, or only part of that sum should be raised in the life-time of the husband and wife, then that it should be lawful for the survivor of them, by his or her last will or testament in writing, *duly* executed, to raise two thousand pounds only for the purpose of paying the debts of the husband and wife, or either of them, or making a provision for the children of the marriage, except an eldest son. The husband died without executing the power. The wife executed it by a will signed in the presence of only two witnesses.

Power, the definitive execution of one.

HARDWICKE, *Lord Chancellor*, made two points: FIRST, Whether this was a due execution of the power. SECONDLY, Whether, if it was not, the defect might be supplied by a court of equity.

As to the first his Lordship observed, that since the statute of Frauds no wills relating to lands can properly be said to be *duly* executed, unless it be in presence of three witnesses; and that to determine otherwise in this court would be a dangerous innovation; that though the will prescribed by the author of the power is a creature of his own, and the execution of it in the presence of two witnesses might have been good if he had thought fit to have ordered it so, yet as he has expressly directed that it shall be executed *duly*, he must be understood to have referred to some known rule, which, as he himself has mentioned none, can be construed to be no other than the rule of law; and that the statute of Frauds has furnished us with.

1. Wms. 741.
2. Wms. 258.

As to the second point his Lordship had great doubt, and said, there was much difference betwixt defective deeds and instruments *inter vivos* and defective wills: that the former might in many instances be aided where the latter could not.

But afterwards he was of opinion, that the defect in this case might be supplied. He said, where a will is to operate by way of appointment, it takes no effect from the statute, though

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7. Eq. Abr. 189.
3. Salk. 229.
32. Mcd. 278.

2. Wms. 625.
Chan. Caf. 89.

the rules prescribed by the statute may, as in this case, be arbitrarily inserted by the party; and that the appointee cannot claim under the will, but by the deed of settlement directing the execution of the power; which deed, together with the instrument executing the power, make in effect but one in raising the charge upon the land; but that in point of law the charge is created by the deed directing the execution of the power: to which purpose is the argument of MR. JUSTICE POWELL in *Scatterwood v. Edge*. But to bring the matter still nearer this case: If instead of the power to charge the lands with this sum of money, it had been to create a term for this purpose, the party claiming the benefit of the term, if his right had been disputed, must have pleaded the deed creating the power; so that the whole of this case must be taken on the deed and the power together. And the statute of Frauds is entirely out of the question, except so far as it is the rule which the appointee is directed to follow in the execution of the power. It is objected, that at law as well as in equity a power relating to lands to be executed by will must be executed by a will pursuant to the statute. This is true. So if a power is to be executed by deed, and there be any defect in this deed, it must fall to the ground. But this is to be understood only where the power is executed voluntarily: for if there be any meritorious consideration, as the payment of debts, or a provision for younger children, this Court will interpose, and aid the defect. In the case of *Smith v. Asheton*, 1. Chan. Ca. 264. where there was a defective execution of the power in point of circumstance, yet the substance being performed, the Court held they might relieve. So in the principal case, the neglect is only in form and circumstance. In the case of *Follett v. Follett*, 2. Wms. 489. the husband had a power to make a jointure to his wife by deed; he made it by will; this defect was set right in equity; which determination goes a great way to decide the present question; for why may not this defect be supplied, as in that case a deed be changed into a will? In the case of the *Duke of Marlborough v. the Earl of Carlisle*, Michaelmas Term 1750, there was no consideration of merit to make the Court supply the defect. It has likewise been objected, that the debts which are to be paid by means of this power are the debts of the husband, whereas the estate was originally the wife's; but these debts are expressly provided for by the deed of settlement.

Ex relatione BEATRUFFE.

Case 165.

Adams against Danvers.

In Chancery, May 3, 1755.

DECREE, June 7, 1755.

Portion, when
raisable by sale
or a reversionary
term.

BY A DEED OF SETTLEMENT dated in May 1723, reciting a marriage between John Palmer, jun. and Anne Danvers, and that she was intitled to have a portion of three thousand pounds,

John

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against
DANVERS.

John Palmer the father conveyed lands to trustees and their heirs to the use of *John Palmer* the son for life, remainder to *Anne* for her life for her jointure, remainder to trustees to preserve the contingent remainders, remainder to the first and every other son of *John Palmer, jun.* on the body of his said wife, and for default of such issue male, to the trustees for a term of five hundred years, upon trust, that in case at the time of failure of issue male of the said *John Palmer, jun.* by the said *Anne*, or at any time after, there should happen to be any one or more daughter or daughters of their bodies, that the trustees should, by sale or mortgage of the said estate and term of five hundred years in the said lands, and by and with the rents and profits thereof, *in the mean time and until such sale*, raise for the maintenance and portions of all such daughter and daughters such sums as thereafter are mentioned, *viz.* if but one, three thousand pounds to be paid at twenty-one or marriage, which should first happen, and also the sum of one hundred pounds yearly for her maintenance and education *in the mean time until such portion should be raised by sale, by mortgage or sale, or should become payable as aforesaid*: provided, that no such mortgage or sale should be made until one or more of the said portions should become payable; and if the said *John Palmer, jun.* should in his life-time, or at his death, make a provision for such daughter or daughters, or suffer lands of inheritance or goods of as great value to come to his daughters at any time during his life-time, or at his death, then the portions were not to be raised by the deed, and the term was to cease and be void. Provided also, that if such daughter or daughters should die before her or their portion, &c. become payable, then it should not be raised. *John Palmer, jun.* died in 1727, leaving issue only one child, a daughter, who married *Hargrave Adams* in 1741; and in the life-time of the mother, and whilst the daughter was an infant of the age of sixteen years, *Hargrave Adams* and his wife, by deed, dated the fourth of February 1741, reciting, that she was intitled to the three thousand pounds, that her husband was going abroad, and that he was able to make no settlement upon her; and that the husband was desirous to settle this three thousand pounds; therefore the husband assigned the three thousand pounds which was to be raised by the deed of 1723 to trustees, to permit *H. Adams* to receive the interest and profits of it during the joint lives of himself and his wife; and if at their death they should leave issue, then that the three thousand pounds should be paid and divided to and amongst such issue; and if there should be none, or such issue should die, &c. that fifteen hundred pounds, part of the said three thousand pounds, should be paid to such person as *Anne Adams* should by her will appoint; and for want thereof, then that it should be paid to her mother *Anne Palmer* (as the mother was a party to this deed); and as to the remaining fifteen hundred pounds, this was to be paid to *H. Adams*, his executors or administrators.

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Hargrave Adams died without issue soon after; and before he went abroad, his representative now brought his bill to have the three thousand pounds and interest raised in the life-time of *Anne Palmer* the mother, by sale or mortgage of the term of five hundred years, and that it might be disposed of according to the deed of the fourth of *February 1741*. The other bill was brought to have the three thousand pounds and interest raised and paid to the representatives of *Anne Adams*, who claimed the whole, and disputed the deed of the fourth of *February 1741*. The remainder man who claimed under the deed of settlement in 1723 was a defendant, and insisted the three thousand pounds portion was not raisable in the life-time of the mother.

On the seventh of *June 1755*, this cause came before the Court upon an appeal from a decree made by *STRANGE, Master of the Rolls*, and this day *THE LORD CHANCELLOR* gave his judgment.

HARDWICKE, Lord Chancellor. Here are two questions: FIRST, Whether this three thousand pounds is now raisable by sale or mortgage in the life-time of the mother? SECONDLY, If raisable, To whom it belongs? Whether the whole to the daughter, late *Mrs. Adams*, and now *Mrs. N——*? or is it subject to the assignment made by the deed of the fourth of *February 1741*, and one moiety of it will belong to the representatives? I AM OF OPINION with *THE MASTER OF THE ROLLS* upon both points.

FIRST, This question depends upon a point which has gone through various determinations, until *LORD COWPER* made a stand in the case of *Corbett v. Maidwell (a)*. Nothing tended more to the detriment of families, to the promoting of undutifulness of children, nor to the ruin of family estates, than the rule which prevailed before this case: The Court, seeing it, had a remorse of judgment, as *Hobart* calls it. I shall not go back to consider the old cases. *Graves v. Mattison (b)* is the first of them; and it is a strong case. After this was *Stainforth v. Stainforth (c)* and *Gerard v. Gerard (d)*. The ground these cases went upon was, that if the child should wait until the death of its father or mother for the payment of their portion, they could not have the portion when it might be most useful to them, as to prefer them in marriage, &c. These cases are now quite exploded. In *Corbet v. Maidwell*, the Court did not indulge the same latitude of construction; and in *Reresby v. Newland (e)* and *Broome v. Berkley* they have done it still less. Upon this last case I shall chiefly ground my opinion; and if this case comes within the reason of that, I am bound to determine according to it. And in this I shall not act contrary to the notion and sense of modern conveyancers, who provide, that portions shall

(a) 1. Eq. Cases Abr. 337. Salk. 359. 2. Vern. 640. 3. Chan. Rep. 390.
(b) 2. Jones, 201.

(c) 1. Eq. Abr. 337. 2. Vern. 460.
(d) 2. Vern. 458. 2. Freem. 271.
(e) 2. Peer. Waps. 99.

not be raised till the term takes effect in possession. And I dare say no husband, upon executing such a settlement as this, ever thought his child could come in his life-time and demand his portion. I AM OF OPINION, there is no warrantable distinction between this case and that of *Broome v. Berkley*.

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The rule is, that if a reversionary term or estate be limited to trustees to raise portions at a certain time, when that time comes the portion must be raised, unless on a declaration of the trust of the term the intention of the parties appears to the contrary.

2. Wms. 486.
by the Master
of the Rolls.

Here the intention of the parties appears to be, that the portions shall not be raised either in the life-time of the father or mother: the father is made tenant for life of the whole estate, and the whole estate is limited to the mother for life. In jointure, I think there is no difference between making the restriction part of the declaration of the trust of the term and inserting it as part of a negative proviso, for the whole must in construction be taken together.

FIRST, Whether raisable in the life-time of the father?

OBJECTION. The portion would have been raisable in the life-time of the father in case the mother had died first, for then there would have been a failure of issue male.

I say it would not; for the father had during his whole life-time, by the proviso in the settlement, to make a provision for his daughter; and therefore the daughter could not demand this three thousand pounds against him.

But LORD MACCLESFIELD's opinion upon the proviso in *Reresby v. Newland*, 2. Wms. 101. that if the father provide for the daughter a portion equal to what is secured by the settlement, then the term to be void, has been objected; because, says LORD MACCLESFIELD, by this it seems it must be intended, if the father provides such portion payable at such time as the portion by the settlement is made payable. But this proviso is not capable of the same answer; for this clause in the proviso goes further than that did; for the words are, "if lands or goods during his life, or at his death, come to the daughters, of equal value, her portion shall not be raised."

SECONDLY, Whether raisable in the life-time of the mother?

To this the proviso above is not applicable; it only affords an argument against raising it.

It has been objected by MR. ATTORNEY-GENERAL, that the words of the trust term must be construed distributively, *reddendum singula singulis*. I think they must. The portion to be raised by sale or mortgage, and the maintenance, as the words are, in the mean time, and until such sale, by rents and profits. The manner of expression both before and after shews it to be so, "in the mean time, and until such sale," *the same in both*. So also

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also are "the application of the rents in the mean time, and until "the portion shall be raised by sale or mortgage, or shall become "payable as aforesaid." And here is a proviso, that "no sale or "mortgage shall be made until some one or more of the portions "shall become payable." How then was the maintenance to come but of the rents and profits? And how could this be during the life of the father or mother? The term was not to take effect in possession until they both were dead; and here the maintenance is most clearly to precede the portion; and therefore the maintenance is to be paid before it; and as the maintenance cannot take place during the life of either father or mother, the consequence is, that the portion cannot. Is not this then the very same case as that of *Broome v. Berkley* (a), in *Peere Williams*, where the case is truly stated? But it is said, the words are not the same; but there is the same form of expression in both. Indeed in that case there are express words, "that the maintenance shall not take "place until the term takes effect in possession." The difference between the two cases is merely in words; the intent, meaning, and import of the two settlements are the same: and the rule laid down by the Master of the Rolls in *Broome v. Berkley* is the true rule in these cases.

The second question depends upon the deed of the fourth of February 1741.

It has been said, as the husband had a right to this three thousand pounds, as he might assign it or release it, and as the provision made was a reasonable one, and what, if brought before the Court, would at that time have been allowed, it should be so now.

But consider the circumstances of the parties and the deed itself. The wife was an infant under age, and married a man that was worth nothing. No provision whatsoever was made for her or her children before the marriage, but after the marriage this deed was made, which recites, that the husband was then going abroad, that he was not able to make any provision for his wife; then it goes on, and says, "that he (alone) was desirous to settle, &c. and therefore "he assigns, &c." The whole interest he reserves to himself during their joint lives; and though he was going abroad, and his wife confessedly had no other provision, yet nothing is reserved for her, but, in case there should be no issue, a power (and which she is restrained to execute by will only) of disposing of fifteen hundred pounds, part of the three thousand pounds, the other is to go to the husband and his representatives absolutely. I am of opinion, this deed should be set aside; I do not think the provision reasonable; and I think the benefit which is limited to survive to the mother such, as she is the friend by nature most to be relied on in taking care of the interest of her child, that for example sake it ought to be set aside. This Court always takes care of the interest of the wife. As to the husband's power over her estate, it was held in

(a) 2. Peer. Wms. 484.

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Bates v. Danby, that he might assign it for a valuable consideration; but so far as his assignment was voluntary, the Court there decreed so much belonged to the wife who survived. Here is no valuable consideration, it is voluntary; which brings it to the question, Whether reasonable? And I am of opinion it was not. There was no reason to give the husband fifteen hundred pounds although the wife survived. Here is nothing reserved for her, or for her separate maintenance during her husband's absence. If this had gone before the Master, he would not have divided thus. The husband could not have the portion without the assistance of this Court, neither can his representatives. If she made no disposition by will, it was to go to the mother; and she is tied up to do it by will; and the mother, the principal friend to be relied on to take care of her daughter's interest, has unwarrantably stipulated for a benefit for herself. AND THEREFORE I AM OF OPINION, the whole decree must be affirmed upon both points (a).

(a) See *Churchman v. Harvey*, Amb. 355. *Stephens v. Dethick*, 3. Atk. 39. *Sandys v. Sandys*, 1. Peer. Wms. 707. *Heblethwaite v. Cartwright*, Cases T. T. 31. *Stanley v. Stanley*, 1. Atk. 549. *Hall v. Carter*, 2. Atk. 354. *Lyon v. the Duke of Chandos*, 3. Atk. 416. *Smith v. Evans*, Amb. 633. *Conway v. Conway*, 3. Brown's Cases Ch. 267.

Bowles against More.

Case 166.

At the Rolls, Trinity Term, 1755.

LADY ANNE MORE having a power, notwithstanding her coverture, to dispose of her estates, one in *Bedfordshire* and the other in *Lincolnshire*, and also of four thousand pounds, made her will the tenth day of *November* 1716, and thereby (amongst other things) devised in manner following: "I will, direct, and appoint, that upon my decease the sum of four thousand pounds be paid to trustees to be placed out by them at interest; and that the rents of her said estates be also paid to them; IN TRUST to pay thereout several annuities amounting to two hundred pounds *per annum*." And then follow these words: "And as to the four thousand pounds, I give it, and hereby appoint and direct, that if all the said annuitants are deceased, the principal sum shall be then divided equally to and amongst all the children of my said son *Joseph Edmonds More*, except his eldest son. But my will is, that if any one or more be then under the age of twenty-one years, that the part or proportion of every such minor child or children be managed for his, her, or their benefit till twenty-one years; and in case any one or more such younger children die before the decease of all the annuitants, and leave issue, I will and direct, that the share or part which should have belonged to such child or children so dying shall go and belong to the issue of the deceased; and in case there shall not be any younger child or children of my said son *Joseph Edmonds More*, nor issue living of any of them at the decease of the survivor of all the said annuitants, then in that case I give and dispose of, limit and appoint, the four thousand

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" thousand pounds, and the said several estates in the counties of
" *Bedford* and *Lincoln*, as followeth (*i. e.*) My will is, that the per-
" son who shall then be the eldest son of my said son *Joseph Edmonds*
" *More* shall have both the said *Lincolnshire* and *Bedfordshire* estates
" to him and his heirs for ever."

Lady Anne More died in the year 1720, leaving three younger children of her son *Joseph Edmonds More*; and after, in the year 1730, *Thomas More*, another younger child, was born; and *Joseph Greenhill*, the last surviving annuitant, did not die until the twenty-fifth of *March* 1746.

The question was, Whether *Thomas More* was intitled to any share of this four thousand pounds?

The objection was, that he could not, as he was neither *in esse* nor *en ventre sa mere* at the death of *Lady More*, when the will must operate, and when the legacy was to take effect and vest in the children; and the rather, as the interest was only devised to the children.

THE MASTER OF THE ROLLS. It is to no purpose to cite cases upon this head. Every case of this sort must depend upon its own circumstances, and be ruled upon them and the intention of the devisor. The words underlined plainly shew, that *Lady More* intended he should have his share, and that the legacy was not to vest or be paid until the death of the last annuitant. If the three younger children had died, and there had been only *Thomas More* surviving when the last annuitant died, he must have taken; for the devisee over could not take by the words so long as there was any younger children of *Joseph Edmonds More* in being.



A TABLE

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2. See also *Soley v. Salisbury*, 153
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4. The obligor, on payment of 20l. to the obligee, procured a bond and notes for money to be delivered up to him, upon pretence that he was poor, and nearly related to the obligee; but that not being proved, he was ordered to account for the bond and notes, *Lucas v. Adams*, 118

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If a father who is possessed of an advowson, which he apparently designed for his son, be prevailed on, when in an infirm state of mind, to enter into articles for the sale of it to another person, a court of equity will not compel a specific performance, although there is no imposition or fraud imputable to the purchaser, *Bell v. Howard and Others*, 302

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4. If an annuity be given on condition of "releasing all right to the estate," it means a release by fine, *Acherley v. Vernon*, 75
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2. If a lessee for years covenant not to alien without licence of the lessor, under penalty of forfeiting the lease, and he afterwards aliens without licence, equity will not relieve him, *Waser v. Mocato*, 112

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8. *A.* devises his lands to trustees for payment of debts and legacies, and after to *B.* in tail male. *B.* suffers a recovery, and enters into a treaty of marriage with *C.* an infant, a legatee of 3000l. and also of a bond of 200l. charged on the said estate; on which *B.* covenants with trustees, by articles, that in consideration of the intended marriage,

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- marriage, and of the portion of 3000*l.* and bond of 200*l.* to settle a jointure upon C. of one-third of the devised estate, which was about 300*l.* a-year, in bar of dower : the marriage took effect, and the wife survived ; but her *chofes in action*, being the consideration of the settlement, fhall not fufvive in equity, *Seys v. Price*, 217
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“ ALSO his houfe and gardens thereto
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5. Where a man covenants to lay out a sum of money in the purchase of lands, and devises his real estate before he has made such purchase, the money to be laid out will pass to the devisee. Cases cited, 78. *notis*
6. But where *A.* devised "all his real and personal estate," and afterwards articulated to purchase lands, and then died, the heir at law was held to be entitled to this estate, as not passing by the will. Cases cited, 78. *notis*
7. If *A.* in consideration of marriage, covenant to settle his estate, within two years, to the use of himself for life, without impeachment of waste, with remainder to his wife for life, remainder to his heirs male in tail special, remainder to the heirs of the body of such heirs male, with remainder to his own right heirs ; and that he should stand seised to the said uses until a settlement should be made ; and then, without making the settlement, levies a fine, and afterwards declares different uses, and dies, leaving a large estate to descend to his eldest son, to whose use no part of the estate was declared under the fine ; EQUITY will decree a settlement to be made pursuant to the uses declared in the marriage-articles, *Trevor v. Trevor*, 161

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- court, *Attorney General v. Baliol College, Oxford*, 411
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4. A freeman of London having one daughter, and several grandchildren by her, devised his personal estate to pay debts and legacies; and afterwards what remained to be sold, and the money arising by sale, viz. the interest, to be paid to his grandchildren, share and share alike, until of age, but did not dispose the principal sum; and now his daughter, who was heir at law, and her husband, exhibited a bill to have the principal, *Newland v. Sheppard*, 57
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6. If a man devise all his real and personal estate to trustees, and afterwards purchases a fee farm rent issuing out of his manor, and contracts for the purchase of land, and pays part of the purchase money, but before the contract is completed makes a codicil, whereby he devises "all the lands by me purchased since the publishing of my will to the trustees in my will named;" and then revokes the will as to two of the trustees, and appoints two others; the fee-farm rents and after-purchased lands, although the purchase be not completed at the time of his death, and also all his before-devised real estate, pass; for the codicil is a republication of his will, *Acherley v. Vernon*, 71, 72
7. If a man possessed of freehold, leasehold, and copyhold lands, devise "all his real estate to trustees," without mentioning his copyholds, yet if it appear by a codicil to have been the intention of the testator, the copyholds shall pass accordingly, and not revert to the heir at law, *Acherley v. Vernon*, 72
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- them, and the vendor stood seised for him till a legal conveyance could be made, *Davy v. Beardsham*, cited, 75.
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" dispose of, his personal estate to such
" person and to such use as he shall
" think fit, any custom or usage of or
" in the said city, or any by-law or
" ordinance made or observed within
" the same, to the contrary notwith-
" standing: PROVIDED NEVERTHE-
- " LESS, he may agree, by any writing
" under his hand, upon or in confide-
" ration of his marriage, or otherwise,
" that his personal estate shall be sub-
" ject to, or be distributed according
" to, the custom: AND IF such free-
" man shall die intestate, the personal
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" payable upon any demise or lease of
" any lands, tenements, or heredita-
" ments, which determined on the
" death of such tenant for life, the
" executors or administrators of such
" tenant for life shall recover, in an
" action on the case, of and from such
" undertenant or undertenants of such
" lands, tenements, or hereditaments;
" if such tenant for life die on the day
" on which the same was made paya-
" ble, the whole, or if before such day,
" then a proportion of such rent, ac-
" cording to the time such tenant for
" life lived of the last year, or quarter
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